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## COMMENT

# LANGUAGE RIGHTS AND THE LEGAL STATUS OF ENGLISH-ONLY LAWS IN THE PUBLIC AND PRIVATE SECTOR

## INTRODUCTION

The recent English-only movement has produced state resolutions, statutes, and constitutional amendments establishing English as the "official" language.<sup>1</sup> English-only rules are intended to eliminate governmental services in languages other than English. In the workplace, English-only rules require employees to refrain from speaking languages other than English on the employer's premises.<sup>2</sup> Proponents of these measures argue that the purpose of this legislation is to promote national unity and protect the only common bond which holds our divergent society together.<sup>3</sup> So far voters or legislators have enacted English legislation in 16 states,<sup>4</sup> and nowhere has such an initiative been defeated at the polls. In 1986 California voters, by a margin of 73 to 27 percent, adopted a consti-

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1. "U.S. English" is the largest, most aggressive, and most successful of the political groups promoting English as the official language in the United States. It has grown rapidly, from 300 members in 1983 to 400,000 nationwide as of 1990, with about half of these members in California. The activities of U.S. English include lobbying for a federal constitutional amendment making English the official language of the United States, restricting government funding for bilingual education to short-term transitional programs, and supporting state official English statutes. Gonzalez, Schott, and Vasquez, *The English Language Amendment: Examining Myths*, 77 ENGLISH J. 24 (1988); Bernstein, *In U.S. Schools: A War of Words*, NEW YORK TIMES MAGAZINE, Oct. 14, 1990, Sec. 6:34, 48 (1990). Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 300 (1989).

2. Note, *English-only Rules and Innocent Employers: Clarifying National Origin Discrimination and Disparate Impact Theory under Title VII*, 74 MINN. L. REV. 74 (1989). [Hereinafter *English-only Rules* and 'Innocent' Employers].

3. For a good discussion on this point see J. Leibowicz, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE L. & POL'Y REV. 519 (1985).

4. Only two states, Nebraska in 1920 and Illinois in 1923, (see NEB. CONST. art I, § 27, and ILL. ANN. STAT. ch. 1 para. 3005 (1990)), declared English as their only official language prior to the beginning of the English-only movement, which was set in motion at the beginning of the 1980s by U.S. English. The other states are: Alabama in 1990, ALA. 1901 CONST., Amend. 509; Arkansas in 1987, 1987 ARK. ACTS 40; California in 1986, CAL. CONST. art. III § 6; Colorado in 1988, COLO. CONST. art. II, § 30(a); Florida in 1988, FLA. CONST. art. II, § 9; Georgia in 1986, 1986 GA. LAWS 70; Indiana in 1984; IND. CODE ANN. tit. 1, art. 2, ch. 10 § 1 (1988); Kentucky in 1984, KY. REV. STAT. ANN. § 2.013 (1985); Mississippi in 1987, MISS. CODE ANN. § 3-3-31 (1989); North Carolina in 1987, N.C. GEN. STAT. § 145-12 (Supp. 1987); South Carolina in 1987, S.C. CODE ANN. § 1-1-696 (1988); Tennessee in 1984, TENN. CODE ANN. § 4-1-404 (1985); and Virginia in 1981, VA. CODE ANN. § 22.1-212.1 (1985). Since 1978 Hawaii has been officially bilingual-Native Hawaiian and English are coequal languages, see HAWAII CONST. art. xv, § 4.

tutional amendment declaring English the state's official language. In 1988 Florida voters approved a similar amendment by 84 to 16 percent.

U.S. English and other proponents of English only claim that such laws are only intended to restrict governmental services in languages other than English.<sup>5</sup> Since English is indisputably the primary language of the United States, with ninety-eight percent of the inhabitants speaking it,<sup>6</sup> declaring English the official language appears harmless. However benign the declaration of an "Official" language seems, such laws may have severe discriminatory repercussions.<sup>7</sup>

Restrictive language practices have also appeared in the workplace. Employer rules which prohibit minority-language workers from speaking in their native languages to coworkers are widespread.<sup>8</sup> While Title VII of the Civil Rights Act of 1964 outlaws employment discrimination based on race, color, religion, sex, or national origin, the statute does not expressly prohibit discrimination on the basis of language.<sup>9</sup> An important question is to what degree language discrimination is construed by the courts as national origin discrimination, which is an area protected by Title VII.<sup>10</sup>

Official English legislation gives rise to numerous legal issues. Despite its obvious importance, there has been relatively little scholarly attention directed toward the issue of language rights in the United States. This Comment analyzes the issues raised by English-only rules: state constitutional laws and statutes, and workplace rules restricting services and discourse to the English language. Part I reviews the historical and social conditions that have influenced the rise of the recent English-only laws. In part II, the major equal protection and First Amendment cases on language rights will be analyzed. Part III discusses the English-only laws in the workplace. The courts have been severely split in their inter-

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5. Chen, *Language Rights in the Private Sector*, in *Language LOYALTIES: A SOURCE BOOK ON THE OFFICIAL LANGUAGE CONTROVERSY* (1991).

6. See *Califa*, *supra* note 1, at 294.

7. Following passage of Official English initiatives in Arizona, Colorado and Florida in 1989, there were several instances of language discrimination including the suspension of a supermarket clerk for answering a fellow-employee in Spanish, the denial of parole to non-English speaking prisoners in Arizona until confusion over the official English law was cleared up, and an instance of a school-bus driver in Colorado reprimanding children for speaking Spanish on the school bus. Epic Events (Newsletter of the English Plus Information Clearinghouse), March/April 1989. In North Carolina, after the passage of the Official English statute, the Department of Motor Vehicles stopped giving driver's license tests in languages other than English, as it had previously. It was not until the intervention of the North Carolina Civil Liberties Union that the statute was amended to read that the Division of Motor Vehicles "shall not be permitted to . . . discontinue providing drivers' license examinations in any language previously administered." N.C. GEN. STAT. 145-11 § 1.1, letter from North Carolina Civil Liberties Union, August 21, 1987.

8. See the incidents described in Note, *English-Only Rules and 'Innocent' Employers*, *supra* note 2.

9. 42 U.S.C. § 2000(e)(2) (1981 & Supp. 1991).

10. See *infra* notes 124-155 and accompanying text.

pretation of Title VII and whether laws requiring English to be spoken on the job violate the 1964 Civil Rights Act. Part IV examines four of the most important statutory language for non-English speakers: the Bilingual Education Act of 1968<sup>11</sup> Title VI of the Civil Rights Act of 1964,<sup>12</sup> the Equal Educational Opportunities Act of 1974,<sup>13</sup> and the federal Voting Rights Act as amended in 1975 and extended in 1982.<sup>14</sup> Part V critically examines the policy implications of state Official English laws. A major question that remains to be answered is whether these are merely symbolic statutes or whether they can be used to the disadvantage of language minorities.

## I. BRIEF HISTORY OF LANGUAGE PROTECTION AND RESTRICTION IN THE UNITED STATES

### A. *Reasons for Lack of an Official Language*

Despite the lack of constitutional protection, English in the United States has come to enjoy a privileged position. John Adams's proposal to set up a national language academy, which would have in effect made English the official language, was debated and rejected by the founding fathers.<sup>15</sup> The idea of government regulating American speech was deemed to be incompatible with the spirit of freedom of speech in the United States.<sup>16</sup> During the nation's first century there was, in general, a laissez-faire attitude governing language issues.<sup>17</sup> For example, the Articles of Confederation were printed in German, and at different times federal documents appeared in French, German, Dutch and Swedish.<sup>18</sup>

Bilingual instruction was common throughout the nineteenth century in both private and public schools. It was explicitly authorized by law in states like Ohio (English-German 1839) and Louisiana (French-English, 1847).<sup>19</sup> The German influence in Pennsylvania was so substantial that German schools received public funding well into the nineteenth century.<sup>20</sup>

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11. 20 U.S.C.A. §§ 3281-3386 (1990).

12. 42 U.S.C. § 2000(d) (1981 & Supp. 1990).

13. 20 U.S.C. §§ 1701-1758 (1991).

14. 42 U.S.C. §§ 1971-1974 (1981 & Supp. 1991).

15. Baugh and Cable, *A History of the English LANGUAGE*, 254-69, (1978); Heath, *A National Language Academy? Debate in the New Nation*, 11 INT'L J. SOC. LANG. 9, 19-22 (1976).

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

17. Heath, *supra* note 15 at 9-43.

18. Kloss, *THE AMERICAN BILINGUAL TRADITION*, 6-7 (1977).

19. *Id.* at 84.

20. Conklin and Lourie, *A HOST OF TONGUES*, 65 (1983).

## B. *The Rise of Language Restriction*

By the middle of the nineteenth century, a stronger central government reduced the importance of tongues other than English. Beginning in the 1870s, the U.S. government began forcing Indian children into boarding schools and punishing them for using their own dialects.<sup>21</sup> After the United States acquired Puerto Rico in the Spanish-American War, federal authorities mandated English as the sole language of instruction on the island.<sup>22</sup> In New Mexico, which was ceded to the United States in 1848, English speakers remained a minority until 1900.<sup>23</sup> Spanish-speakers shared political and economic power with Anglos, and the Spanish version of bilingual territorial laws generally took precedence over the English in disputed cases.<sup>24</sup> However, the United States government refused to grant statehood until 1912, when Anglos finally outnumbered Hispanics, thereby putting an end to any challenge by Spanish to the pre-eminence of English in American life and to the possibility of official bilingualism at the state level.<sup>25</sup>

### 1. The Americanization Movement

The first English language requirement for naturalization was adopted with the explicit purpose of limiting the entrance into the United States of Southern and Eastern Europeans.<sup>26</sup> In 1916, the National Americanization Committee, which worked closely with the federal Bureau of Education, sponsored a bill in Congress to deport all aliens who would not apply for citizenship within three months.<sup>27</sup> During the war, the idea of expulsion as an alternative to assimilation was frequently discussed.<sup>28</sup> The National Americanization Committee proposed requiring all aliens to learn English and apply for citizenship within three years or face deportation.<sup>29</sup>

After 1900, Italians, Jews and Slavs began to outnumber Irish, Germans, and Scandinavians.<sup>30</sup> Immigrants were arriving in such number, and were so concentrated in urban areas, that many observers

21. Park, *Historical Foundations of Language Policy: The Nez-Perce*, in *Language Renewal Among American Indian Tribes* (St. Clair and Leap eds. 1982).

22. Language Policy Task Force, *Language Policy and the Puerto Rican Community* 5 BILINGUAL REV. 6, 6-9 (1978).

23. Schmid, *Language and Education Rights in the United States and Canada*, 36 INTERN. & COMP. L. Q. 903, 905 (1987).

24. *Id.*

25. *Id.*

26. HIGHAM, *STRANGERS IN THE LAND. PATTERNS OF AMERICAN NATIVISM 1860-1925*, 101 (1967).

27. *Id.* at 248, 259.

28. *Id.* at 248.

29. *Id.* at 249.

30. CRAWFORD, *BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY AND PRACTICE* 22 (1989).

questioned whether it was possible for the new immigrants to fit into American society.<sup>31</sup> Religious prejudice was joined with "pseudoscientific" racial theories. In addition, linguistic differences also helped in creating negative stereotypes and in arousing antipathy against the newcomers.<sup>32</sup> In 1911, the federal Dillingham Commission complained that the "new" immigrants — the Italians, Jews and Slavs — were much slower "to learn the English language, and to abandon native customs and standards of living" than "old" nineteenth century immigrants from Ireland, Germany and Scandinavia.<sup>33</sup> For the first time in American history, an ideological link was forged between language and "Americanism."<sup>34</sup>

By 1919, twenty-three states had enacted laws restricting instruction in foreign languages.<sup>35</sup> Many of these states mandated English as the exclusive language of instruction in the primary grades.<sup>36</sup> On the eve of the First World War, the fear of Germans as the largest, most cohesive ethnic group, made their language especially susceptible to special prohibition.<sup>37</sup> It took the Supreme Court in 1923 to strike down the most extreme of these laws.

## 2. *Meyer v. Nebraska*

In *Meyer v. Nebraska*,<sup>38</sup> the United States Supreme Court reversed the conviction of a Nebraska schoolteacher. Robert Meyer was charged with the crime of teaching a Bible story in German at a private school to a ten year old child.<sup>39</sup> The Nebraska statute prohibited the teaching of any language other than English to a child who had not passed the eighth grade.<sup>40</sup>

The Court determined that the right to teach a language and the right of parents to engage a teacher to instruct children in a foreign language are among the liberties protected against state infringement by the Due

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31. Wagner, *The Historical Background of Bilingualism and Biculturalism in the United States*, THE NEW BILINGUALISM 39, (Ridge, 1981).

32. *Id.*

33. Crawford, *supra* note 30, at 60.

34. *Id.* at 22.

35. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 133 (1988).

36. *Id.*

37. *Id.* at 130, 133, n.44. Louisiana had one of the most restrictive laws, which stated: [i]t shall be unlawful for any teacher, professor, lecturer, person or persons employed in the public, private, elementary or high schools, colleges, universities, or other institutions . . . that in any way form part of the public or private educational system or educational work in the state of Louisiana, to teach the German language to any pupils or class. LA. LAWS OF 1918, act 114, § 1.

38. 262 U.S. 390 (1923).

39. *Id.* at 396-397.

40. *Id.* at 397.

Process clause of the Fourteenth Amendment.<sup>41</sup> The Court went on to note that: "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution . . . ."<sup>42</sup>

On the same day that *Meyer* was decided, the United States Supreme Court struck down similar statutes in Ohio and Iowa.<sup>43</sup> Nebraska, Iowa and Ohio all attempted to show that there was a legitimate need for language laws, and that they were within the police power of the states.<sup>44</sup> Furthermore, the three states argued that the statutes were needed to ensure that school children were educated into loyal and patriotic citizens.<sup>45</sup> In the Nebraska brief, it was argued that the legislation was designed "to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals."<sup>46</sup>

This brief history of language restriction in the United States shows that language can be used as a mask for racial, economic and political hostility of individuals who speak other tongues.<sup>47</sup> A spirit of exclusiveness spread when a rapid influx of immigration coincided with a major domestic and international crisis. Under these conditions a significant segment of American society felt that national unity depended on maintaining cultural homogeneity.<sup>48</sup>

### C. *The Current English-only Movement*

Although today's Official English movement does not share the extreme goals of the Americanization movement, there are many philosophical similarities between the two movements. First, there is an implicit comparison between "new" immigrants who are unwilling to assimilate and "old" immigrants who readily assimilated to American culture. Second, there is an equation of linguistic diversity with political

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41. *Id.* at 400. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

42. *Id.* at 401.

43. *Bartels v. Iowa*, 262 U.S. 404, 409 (1923).

44. *See* Ross, *supra* note 35, at 175.

45. *Id.*

46. *Id.* Brief and Argument of State of Nebraska, Defendant in Error, *Meyer v. Nebraska* at 12-13.

47. Leibowicz, *supra* note 3, at 538-539.

48. HIGHAM, *supra* note 26, at 234-262.

disunity and fragmentation of the American culture. Finally, there is a link between English proficiency and American identity.

After half a century of relative language peace, in the 1980s language has again become the focus of a great deal of contention. Attempts to protect the official status of the English language in American life have appeared on both the local and national levels.<sup>49</sup> An English Language Amendment was introduced in the last five Congresses and has been re-introduced in the 102nd Congress.<sup>50</sup> There are several reasons why language rights have emerged as one of the most important issues in the late 1980s. The United States has experienced another large wave of immigration that has called attention to the country's linguistic diversity. Between 1961 and 1986, approximately 328,000 immigrants came from China and Japan and 1,147,000 immigrated from Mexico. In 1987, the United States accepted three hundred thousand Hispanic immigrants.<sup>51</sup> Increased immigration has fostered the perception that newcomers are no longer learning English. English-only advocates argue that for the first time, a majority of immigrants speak one language - Spanish.<sup>52</sup> Contrary to earlier waves of immigrants, they maintain that Spanish-speakers are unwilling to learn English.<sup>53</sup> For this reason, most attempts to protect English, although facially neutral, have been targeted at Spanish speakers.<sup>54</sup>

This stereotype is contradicted by empirical evidence. A recent study by McCarthy and Valdez confirms a classic three-generation pattern of language acquisition.<sup>55</sup> The first generation is primarily monolingual, the second generation is bilingual, and in the third generation English is the preferred language over Spanish.<sup>56</sup> A second study by Veltman concludes that the rate of Anglicization by Spanish speakers cannot be distinguished from prior waves of immigrants. In fact, Spanish speakers are fast approaching a two-generation pattern of language loss as compared to the three-generation model typical of immigrant groups in the past.<sup>57</sup> Spanish monolingualism persists because of continued immigration, not because Spanish immigrants fail to learn to speak English.<sup>58</sup>

English-only advocates maintain that unless English is declared the

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49. See Leibowicz *supra* note 3; Califa, *supra* note 1, at 303-305; USA Today, Oct. 11, 1990, at A5, col 8.

50. *Id.*

51. See Note, *English-only Rules and "Innocent" Employers*, *supra* note 2, at n.16.

52. Califa, *supra* note 1, at 312-313.

53. *Id.* at 313-14.

54. Liebowicz, *supra* note 3, at 522.

55. MCCARTHY AND VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA (1986).

56. *Id.* at 65.

57. VELTMAN, THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES 3, (1988).

58. *Id.* at 45.



official language of the United States, the nation will become divided along linguistic lines.<sup>59</sup> This argument vastly underestimates the desire of Hispanic parents to have their children learn English. A 1985 Miami survey found that 98 percent of the Hispanic respondents said it was "essential for children to read and write English perfectly," as compared with 94 percent of Anglo respondents.<sup>60</sup>

The current English-only movement has created much of the divisiveness it seeks to avoid by polarizing the Hispanic and Anglo populations. In a 1988 study of exit polls in California and Texas, Schmid concludes that a majority of Anglos support laws making English the official language of the United States, while Hispanics overwhelmingly reject it.<sup>61</sup> Hispanics see the English-only movement as a new means to justify discrimination, and a threat to their ethnic community.<sup>62</sup> Anglos, on the other hand, support "Official English" as the affirmation of a deeply held conception of nationhood.<sup>63</sup>

Despite the philosophical similarities between the Americanization and Official English movements, Califa observes that "recent immigrants arrive in the United States with considerably more political empowerment than earlier immigrant groups."<sup>64</sup> To what extent are there more legal language now for non-English speaking immigrants? Is there a constitutional entitlement to language rights which was unavailable to earlier newcomers?

## II. THE EQUAL PROTECTION CLAUSE AND LANGUAGE RIGHTS

The most obvious source of constitutional protection against government sponsored language-based discrimination is the Equal Protection Clause of the Fourteenth Amendment.<sup>65</sup> The Supreme Court applies a "strict scrutiny" standard of review to classifications that infringe upon rights considered "fundamental", or classifications that single out "suspect classes".<sup>66</sup> Strict scrutiny has been interpreted as applying not only to discrimination on the basis of race, but also to discrimination based on

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59. CRAWFORD, *supra* note 30, at 54.

60. *Id.* at 60.

61. Schmid, *The English-only Movement: Social Bases of Support and Opposition Among Anglos and Latinos*, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL LANGUAGE CONTROVERSY (1991).

62. *Id.*

63. Citrin, Reingold, Walters, and Green, *The "Official English" Movement and the Symbolic Politics of Language in the United States*, 43 WESTERN Pol. Q. 535 (1990).

64. Califa, *supra* note 1, at 299. He does not elaborate on this theme, however.

65. U.S. CONST. amend. XIV, § 1. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

66. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6 at 1451-54 (2d ed. 1988).

national origin.<sup>67</sup> Strict scrutiny has also been applied to categorizations impinging upon fundamental rights such as privacy,<sup>68</sup> marriage,<sup>69</sup> voting,<sup>70</sup> travel,<sup>71</sup> and freedom of association.<sup>72</sup>

An intermediate level of scrutiny is applied to classifications that implicate the rights of "quasi-suspect" groups, such as classifications on the basis of sex<sup>73</sup> or illegitimacy.<sup>74</sup> Under an intermediate level of scrutiny, a statutory classification is validated if it substantially furthers a legislative purpose.<sup>75</sup> Classifications that do not implicate either specially protected rights or specially protected persons are granted broad deference by the courts utilizing the "rational basis" standard.<sup>76</sup> The courts will uphold the law so long as it has a rational or reasonable basis.<sup>77</sup>

### A. *The Rights of Language Minorities under the Constitution*

There are few Supreme Court decisions on language rights. The few cases which have vindicated the rights of language minorities have not been based exclusively on language. In *Meyer*, the decision was based primarily on the due process right of parents to rear their children without state interference.<sup>78</sup> The Supreme Court relied on *Meyer* three years later to declare unconstitutional a Philippine statute in *Yu Cong Eng v. Trinidad*.<sup>79</sup> That statute required Chinese merchants to keep their books in English, Spanish, or in a local dialect, thereby prohibiting them from utilizing the only language they understood.<sup>80</sup> The Court held that the law was invalid "because it deprives Chinese persons — situated as they are, with their extensive and important business long established — of their liberty and property without due process of law, and denies them the equal protection of the laws."<sup>81</sup> Essentially the Court found that this was a form of national origin discrimination against Chinese, although it did not articulate a constitutional right to use one's native language per se. The only other Supreme Court case addressing language rights, *Lau v. Nichols*, decided the case on Title VI rather than on constitutional

67. In 1954 discrimination on the basis of "ancestry or national origin" was held to be prohibited by the Fourteenth Amendment. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

68. *Roe v. Wade*, 410 U.S. 113, 154-64 (1973).

69. *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

70. *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

71. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

72. *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958).

73. *Craig v. Boren*, 429 U.S. 190, 199-204 (1976).

74. *Trimble v. Gordon*, 430 U.S. 762, 767-68 (1977).

75. *L. TRIBE*, *supra* note 66, at § 16-33, at 1610-18.

76. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

77. *L. TRIBE*, *supra* note 66, at § 16-2, at 1439-43.

78. 262 U.S. 390 (1923); *see supra* notes 38-46 and accompanying text.

79. 271 U.S. 500 (1926).

80. *Id.* at 528.

81. *Id.* at 524-25.

grounds.<sup>82</sup>

The Supreme Court has not resolved the question of whether language-based discrimination constitutes a "suspect" class. A number of legal scholars have argued that language-based discrimination should be afforded strict scrutiny or at least intermediate level scrutiny.<sup>83</sup> They have emphasized the need for strict scrutiny because of the close relationship to national origin discrimination. Like racial minorities, non-English speakers have suffered a history of discrimination (including voting and access to political power), have been stigmatized by government action, and have suffered economic and social disadvantage.<sup>84</sup>

In general, the courts have rejected an equal protection challenge to language minorities unless the case involves a very close relationship to national origin discrimination or involves rights considered fundamental.<sup>85</sup> More common is the reasoning in *Soberal-Perez v. Heckler*,<sup>86</sup> which rejected an equal protection challenge for the failure to provide information in Spanish to Social Security recipients and applicants:

The Secretary's failure to provide forms and services in the Spanish language, does not on its face make any classification with respect to Hispanics as an ethnic group. The classification is implicitly made, but it is speaking versus non-English-speaking individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class.<sup>87</sup>

Employing similar reasoning, the Sixth and Ninth Circuits have held that language is not synonymous with nationality. In the Sixth Circuit's decision in *Frontera v. Sindell*, the Civil Service Commission in conducting the examination in English, did not discriminate against a Spanish-speaking applicant on account of his nationality.<sup>88</sup> The equal protection clause does not require that the State attack all aspects of a problem, "(i)t is enough that the State's action be rationally based and free from invidious discrimination."<sup>89</sup> In *Carmona v. Sheffield*, the Ninth Circuit held that the failure to provide information in Spanish regarding unemployment insurance benefits was not violative of equal pro-

82. 414 U.S. 563 (1974); see *infra* notes 188-195 and accompanying text.

83. See Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981); Comment, "Official English:" *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987); Califa, *supra* note 1, at 332-335.

84. *Id.*; see especially Note, *Quasi Suspect Classes*, at 917-20.

85. See *Olague v. Russionello*, 797 F.2d 1511 (9th Cir. 1986), *cert. granted*, 481 U.S. 1012, *vacated* 484 U.S. 806 (1987), (the challenged investigation targeted recently registered, foreign-born voters who requested bilingual ballots) and *Hernandez v. Texas*, 347 U.S. 475 (in a case involving jury selection, the Court linked discrimination on the basis of Spanish surnames to discrimination on the basis of national origin).

86. 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

87. *Id.* at 41.

88. 522 F.2d 1215 (6th Cir. 1975).

89. *Id.* at 1219.

tection under the rational basis test.<sup>90</sup> Finally, in *Pabon v. MacIntosh*, the court concluded that classes held only in English are not a violation of the equal protection clause in the absence of a suspect classification or a fundamental right.<sup>91</sup> The standard of judicial review under the Equal Protection Clause will continue to be a major issue in the area of language rights. The current interpretation of the equal protection analysis does not recognize language discrimination as a subset of national origin discrimination. Therefore, English-only laws are not deemed "suspect."

### B. *Protection of Language Rights under the First Amendment*

English-only laws imposed by the government on private businesses may violate the First and Fourteenth Amendment. The First Amendment prohibits government from abridging freedom of speech, expression, and association.<sup>92</sup> The First Amendment is clearly implicated when the government directly restrains the private use of foreign languages.<sup>93</sup> The primary goal of the Fourteenth Amendment is to secure equal treatment against discrete and insular minorities, specifically on the grounds of race and national origin or classifications that have an impact on fundamental rights.<sup>94</sup>

Very few cases have challenged official English laws or governmental restraints on the use of foreign languages. The two cases that have implicated the First Amendment are directly related to the 1980s English-only movement. In *Asian American Business Group v. City of Pomona*, Pomona restricted the size and language of business signs.<sup>95</sup> The 1988 ordinance provided that: "on-premises signs of commercial or manufacturing establishments which have advertising copy in foreign alphabetical characters shall devote at least one half of the sign area to advertising copy in English alphabetical letters."<sup>96</sup>

The court held that the ordinance was unconstitutional on three major grounds. First, the court observed that by requiring one half of the space to be devoted to English characters, the ordinance regulates the cultural expression of the sign owner, since the "language used is an expression of national origin, culture and ethnicity."<sup>97</sup> Secondly, the ordinance as a regulation of noncommercial speech fails to meet the standard of strict scrutiny, by serving a compelling governmental interest.<sup>98</sup> Finally, the

90. 475 F.2d 738 (9th Cir. 1973).

91. 546 F. Supp. 1328 (E.D. Pa. 1982).

92. *TRIBE*, *supra* note 66, at 790.

93. *Chen*, *supra* note 5.

94. *Supra* notes 65-72 and accompanying text. *See also* *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

95. 716 F. Supp. 1328 (C.D. Cal. 1989).

96. *Id.* at 1329.

97. *Id.* at 1330.

98. *Id.*

ordinance burdens the freedom of expression, which is a fundamental interest.<sup>99</sup> *American Asian Business Group*, by restricting language usage, appears to be closer in its reasoning to *Yu Cong*,<sup>100</sup> than to the cases in which a public agency fails to offer information or tests in languages other than English.<sup>101</sup> In both *Yu Cong*, and *American Asian Business Group*, the state restricted the use of language and discriminated on the basis of national origin.<sup>102</sup> A second recent case, *Yniguez v. Mofford*, challenged on First Amendment grounds, found Arizona's Proposition 106, which was passed by voters in 1988, unconstitutional because it was too broadly worded.<sup>103</sup> It would have prohibited governmental officers and employees from using a foreign language in the performance of official duties.<sup>104</sup> The court held that a state may not "require that its officers and employees relinquish rights guaranteed them by the First Amendment as a condition of public employment."<sup>105</sup> The law was ruled unconstitutional on the ground of being "overbroad."<sup>106</sup> The court did not have to reach the question of whether the First Amendment bars English-only restrictions. Nor did it have to decide the more common case in which employees in state offices would be required to cease speaking in languages other than English — for example, state employees officially commenting on matters of public concern in a language other than English or state judges performing marriage ceremonies in a language other than English.<sup>107</sup> The Arizona official English amendment was much more restrictive than most other states. Therefore there is some question whether the reasoning used in *Yniguez* could be used to challenge Official English laws in other jurisdictions.<sup>108</sup>

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99. *Id.* at 1332.

100. 271 U.S. 500.

101. See *supra* notes 86-91 and accompanying text.

102. 271 U.S. 500 (1926).

103. 730 F. Supp. 309 (D. Ariz. 1990).

104. The Arizona English Language Amendment, which amended Article XXVIII of the Arizona constitution, applied to the legislature, executive and judicial branches of government, all political branches, all statutes, and all government officials and employees. It required that except for very narrow exceptions, the state and its officials must "act in English and in no other language." In addition, it prohibited the enforcement of "[any] law, order, decree or policy which requires the use of a language other than English", and permitted any person residing or doing business in Arizona to have standing to bring a law suit. ARIZ. CONST. art. XXVIII, § B1-3.

105. 703 F. Supp. at 314.

106. *Id.*

107. *Id.* at 313.

108. For example, the Florida English Amendment, by comparison only states (a) English is the official language of the state of Florida and (b) The Legislature shall have the power to enforce this section by appropriate legislation. FLA. CONST. art. II, § 9.

### III. ENGLISH-ONLY LAWS IN THE WORKPLACE

#### A. Coverage and Purpose of Title VII

Employees who work for private firms are generally not protected by the United States Constitution, which protects against abuses by governmental but not private entities.<sup>109</sup> Although linguistic minorities lack constitutional protection, Title VII of the 1964 Civil Rights Act<sup>110</sup> provides some measure of protection. Title VII outlaws employment discrimination based on race, color, religion, sex, or national origin.<sup>111</sup> While the Supreme Court has declared alienage, which refers to noncitizenship, to be a suspect criterion with respect to state action, this is not the case under Title VII. In *Espinoza v. Farah Mfg. Co.*, the Supreme Court held that a private employer's refusal to hire aliens did not constitute discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act.<sup>112</sup> Title VII makes it unlawful to refuse to hire, discharge, or "otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."<sup>113</sup> Furthermore, it is forbidden for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee"<sup>114</sup> on the basis of the prohibited criteria. While Title VII does not expressly prohibit discrimination on the basis of language, the Equal Employment Opportunity Commission has issued broad guidelines in defining national-origin discrimination.<sup>115</sup> These include discrimination because of an "individual's or his ancestor's place of origin," or because an "individual has the physical, cultural or linguistic characteristics of a national origin group."<sup>116</sup> The EEOC guidelines specifically recognize that an individual's mother tongue or primary language is an important characteristic of national origin.<sup>117</sup> Although Title VII does not explicitly authorize the EEOC to issue guidelines, the Supreme Court has confirmed the EEOC's authority to do so.<sup>118</sup> EEOC guidelines are generally entitled to considerable deference so long as they are not inconsistent

109. *TRIBE*, *supra* note 66, § 18-1 at 1688-91.

110. Civil Rights Act of 1964, (codified as amended at 42 U.S.C. §§ 2000(e) to 2000(e)(17) (1981 & Supp. 1990). (Workers who are employed by firms with fifteen or more employees are protected under Title VII.)

111. *Id.* § 2000(e)(b).

112. 414 U.S. 86 (1973).

113. 42 U.S.C. § 2000(e)(2)(1) (1981).

114. *Id.* § 2000(e)(2)(A)(2).

115. EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1-7 (1990).

116. *Id.* § 1606.1.

117. *Id.* 29 C.F.R. § 1606.7 (1990).

118. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). The Supreme Court found

with Congressional intent.<sup>119</sup>

Furthermore, the EEOC in response to *Garcia v. Gloor*,<sup>120</sup> where the court held that language, at least for bilingual individuals was a "a matter of individual preference,"<sup>121</sup> issued guidelines specifically addressing English-only workplace rules. These guidelines have been broken down into two categories: when employees are expected to speak English at all times and when English-only rules are only applied at certain times.

When applied at all times, a rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.<sup>122</sup> When applied only at certain times, an employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.<sup>123</sup>

## B. *Narrow v. Broad Interpretation of National Origin*

### 1. Language as a Matter of Individual Preference

The leading cases on whether English-only rules constitute national origin discrimination are *Garcia v. Gloor*<sup>124</sup> and *Gutierrez v. Municipal Court*.<sup>125</sup> The two cases disagree, employing different interpretations of the degree to which language may be considered national origin discrimination. *Gloor*, the only remaining precedent on the issue, establishes the legality of English-only rules.<sup>126</sup> The Court of Appeals for the Fifth Circuit held that a bilingual employee fired for speaking Spanish on the job had not stated a claim of national origin discrimination under Title

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that the 1966 EEOC guidelines on employment testing procedures consistent with the act and, therefore, accorded them great deference.

119. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973).

120. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). (According to Mr. Robert T. Olmos, who helped draft the EEOC guidelines, they were directly in response to the *Gloor* decision. Telephone interview on November 16, 1990.)

121. *Id.* at 270.

122. EEOC Guidelines, *supra* note 115, 29 C.F.R. § 1606.7.

123. *Id.*

124. 618 F.2d 264 (5th Cir. 1980).

125. 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

126. 618 F.2d 264 (1980). The *Gloor* court did not follow the EEOC guidelines on English-only rules, since the EEOC had not yet issued any regulations or general policy on this topic at the time of the ruling.

VII.<sup>127</sup> Hector Garcia, a Mexican American, was employed as a salesman for Gloor Lumber and Supply. His duties included selling lumber, hardware and supplies in both Spanish and English. The store was located in a heavily Hispanic area and many of Gloor's customers wished to be waited on by a Spanish-speaking salesman.<sup>128</sup>

Gloor Lumber had an English-only rule prohibiting its salesmen from speaking Spanish unless they were speaking with Spanish-speaking customers. The Hispanic salesman, with the exception of breaks, were not allowed to speak to each other in Spanish. Garcia was discharged when he spoke Spanish with another salesman during working hours.<sup>129</sup> Garcia sued, claiming that his discharge constituted national origin discrimination in violation of Title VII.<sup>130</sup>

The Court of Appeals held that language discrimination does not constitute national origin discrimination. The choice of which language to speak at a particular time is a matter of individual preference. "Neither the statute nor common understanding equates national origin with the language that one chooses to speak."<sup>131</sup> The court interpreted national origin as one's birthplace or the birthplace of one's ancestors. Title VII "does not support an interpretation that equates the language an employee prefers to use with his national origin."<sup>132</sup> Garcia argued that the English-only rule had a disparate impact<sup>133</sup> on Hispanic Americans, even if that result was not intentional, because the rule was likely to be violated only by Spanish speakers of Hispanic origin.<sup>134</sup> In disparate impact cases, the employer uses "employment practices that are facially neutral . . . but in fact fall more harshly on one group than another."<sup>135</sup> There-

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127. *Id.* at 270-71.

128. *Id.* at 266-67.

129. *Id.* at 266, 268.

130. *Id.* at 266.

131. *Id.* at 268.

132. *Id.* at 270.

133. Under Title VII, two theories exist whereby employees can show national origin discrimination: disparate impact and disparate treatment. Disparate treatment analysis is applicable to employment situations where similarly situated individuals are treated differently because of race, sex, religion or national origin. *International Brotherhood of Teamsters v. United States* 431 U.S. 324, 335 n.15 (1977). Relatively few language cases have been litigated employing disparate treatment theory. The cases that most often utilize this analysis allege discrimination on the basis of manner of speaking or accent. A charging party using disparate treatment will typically allege the denial of an employment opportunity because of his or her accent or manner of speaking is discrimination on the basis of national origin. EEOC Compliance Manual § 623.10 (1987). See, e.g., *Carino v. University of Oklahoma Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984) (a Filipino employee naturalized in the United States was improperly demoted on the basis of national origin, although his accent did not interfere with his ability to perform his job) and *Berke v. Ohio Dep't of Public Works*, 628 F.2d 980 (6th Cir. 1980) (a Polish immigrant was impermissibly denied promotion because of his accent, despite his above average command of English).

134. 618 F.2d at 270.

135. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Until 1988, all the Supreme Court's decisions using disparate impact theory involved objective, stan-



fore, although the policy or practice is applied evenly to all employees, it has a disproportionate effect on members of a particular race, color, sex, religion or national origin.<sup>136</sup> Most English-only rules are analyzed under disparate impact theory and allege discrimination on the basis of national origin.<sup>137</sup> The court failed to accept Garcia's argument, holding that there is no disparate impact if the affected employee "could readily comply with the speak-English-only rule [and] as to him non-observance was a matter of choice."<sup>138</sup>

The court concluded that a bilingual employee's desire to speak his native language is not an immutable characteristic like place of birth, race or sex.<sup>139</sup> The Fifth Circuit accepted Gloor's business reasons for the English-only rule with little analysis. Gloor offered three major arguments: 1) English-speaking customers objected to conversations between employees in Spanish, which they could not understand; 2) requiring bilingual employees to speak English in the workplace, except when they served Hispanic customers, would improve their literacy in English; 3) the rule would enable Gloor Lumber's English-speaking supervisors to supervise Hispanic employees more effectively.<sup>140</sup> The Fifth Circuit interpreted national origin discrimination very narrowly, and declined to critically examine Gloor's business reasons for the English-only rule. While no violation of Title VII was found by the *Gloor* court, the *Gutierrez*<sup>141</sup> court evaluated a similar rule, enacted under similar circumstances and came to the opposite conclusion.

## 2. Language as an Important Aspect of National Origin Discrimination

The Ninth Circuit was the first federal court to endorse the EEOC guidelines on English-only rules.<sup>142</sup> The *Gutierrez* court struck down a rule imposed by three municipal judges prohibiting bilingual court clerks from speaking to each other in Spanish except during breaks. The court found that the English-only policy had a discriminatory impact on His-

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standardized employment tests or hiring criteria. In 1988, in the case of *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the high court expanded the theory's application, holding that disparate impact theory also applies to subjective employment practices.

136. *Id.* at 335 n.15. The court held in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) that a party may rely solely upon disparate impact theory of discrimination as recognized in *Griggs v. Duke Power*, 401 U.S. 424 (1971). To establish a cause of action based on this theory, no intent to discriminate need be shown.

137. EEOC Compliance Manual, *supra* note 133, at § 623.6.

138. 618 F.2d at 270.

139. *Id.* at 269.

140. *Id.* at 267.

141. *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

142. *Id.* Telephone interview with Robert T. Olmos attorney with the EEOC regional office (Los Angeles office) (November 16, 1990).

panics and was not justified by "business necessity."<sup>143</sup> To meet the business necessity test, the court held that the employer's justification must be "sufficiently compelling to override the discriminatory impact."<sup>144</sup> The challenged practice must also "effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable less discriminatory alternative which would accomplish the purpose as well."<sup>145</sup>

Applying this stringent test, the appeals court rejected the five major arguments put forward by the employers to justify their English-only rule. First, the employers argued that the state and country needs to have a single language system. This argument, however, was undercut by the fact that it was an important part of the clerks' duty to communicate with the non-English speaking public in Spanish.<sup>146</sup> Second, the defendants said if an English-only rule was not imposed in the workplace, it would turn into a "Tower of Babel." This claim was contradicted by the fact that the use of Spanish was part of the normal press of court business.<sup>147</sup> Third, appellants asserted that English-only rules are necessary to promote racial harmony. This allegation was unsupported by any evidence, in fact, racial hostility was increased between Hispanic and non-Spanish speaking employees because the English-only rule made Hispanics feel belittled.<sup>148</sup> Fourth, employers contend that the English-only rule is necessary because several supervisors do not speak or understand Spanish and they need to monitor the work of the clerks. However, a more effective way of monitoring the work product of the clerks, since they are required to use their bilingual skills on the job, would be to hire Spanish-speaking supervisors.<sup>149</sup> Finally, the appellants argue that the English-only rule is required by the California Constitution. The court, however, considered the constitutional amendment which was passed by the voters in 1986, as "primarily a symbolic statement" which did not affect communications between co-workers in government.<sup>150</sup> Gutierrez,

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143. *Id.* at 1039-40.

144. *Id.* at 1041.

145. *Id.*

146. *Id.* at 1042.

147. *Id.*

148. *Id.* The appellants also contended that there was a need to assuage non-Spanish-speaking employees' fears and suspicions that Spanish-speakers were engaged in conversations that non-Spanish-speakers could not understand. There was no probative evidence of the Spanish language being used to conceal conversations. *Id.* at 1042-43.

149. *Id.* at 1043.

150. *Id.* at 1044. CAL. CONST. art. III, § 6 provides:

- (a) Purpose: English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.
- (b) . . . English is the official language of the State of California.
- (c) Enforcement: The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of

like Garcia, argued that the English-only rule had a disparate impact on Hispanic employees. By failing to meet the rigorous business necessity standard, the court agreed that the plaintiff successfully established an adverse impact claim.<sup>151</sup> The *Gutierrez* court rejected the reasoning in *Gloor*, relying on the EEOC English-only guidelines and a broader interpretation of national origin.<sup>152</sup>

*Gutierrez* is an especially important case for two reasons. First, it carefully lays out a stringent test of business necessity. Second, the case provides a much broader interpretation of the connection between language and national origin. The court wrote that "[t]he cultural identity of certain minority groups is tied to the use of their primary tongue. The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin."<sup>153</sup> The Ninth Circuit, contrary to the Fifth Circuit, found that language is an important aspect of national origin. The *Gutierrez* decision, before it was vacated as moot by the Supreme Court, created a split between the Circuits.<sup>154</sup> If applied by other courts, the reasoning in the *Gutierrez* decision would invalidate the vast majority of English-only workplace rules, which usually either rely on one or more of the justifications raised in this case or take a narrow view of the connection between language and national origin discrimination.<sup>155</sup>

In addition to the ambivalent standard in the area of language and national origin discrimination, two other areas cast uncertainty on the future of Title VII litigation. The first problem area concerns the proper burden on employers in defending Title VII lawsuits in light of the recent Supreme Court case of *Wards Cove Packing Co. v. Atonio*.<sup>156</sup> The second problem area in Title VII litigation concerns when English-only rules may be justifiably imposed. In *Wards Cove*, the court held that a challenged practice need not be "essential" or "indispensable" to the employer's business.<sup>157</sup> Rather the high court concluded that it need only

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English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

- (d) . . . Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this statute.

151. *Id.* at 1040.

152. *Id.* at 1039-41.

153. *Id.* at 1039.

154. *Perea, English-only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 J. LAW REFORM 265, 272. Perea argues that courts should evaluate English-only rules in terms of disparate treatment and disparate impact. He would require employers under disparate treatment to establish a bona fide occupational qualification defense. If the court adheres to the disparate impact theory, he maintains employers should be required to meet a strict standard of business necessity. *Id.* at 293-303.

155. Chen, *supra* note 5 and accompanying text.

156. 409 U.S. 642 (1989).

157. *Id.* at 659.

serve "in a significant way, the legitimate employment goals of the employer."<sup>158</sup> Therefore, the burden is on the plaintiff to show that the asserted business justifications are not sufficient.<sup>159</sup> *Wards Cove* would lessen the burden on employers in defending Title VII lawsuits and lower the stringent definition of business necessity employed in *Gutierrez*.<sup>160</sup> A second problem area concerns when English-only laws may legitimately be imposed under the EEOC guidelines.<sup>161</sup> The EEOC's commentary to its guidelines indicates that business necessity would exist, "where safety is a consideration such as in work situations requiring close coordination among employees where the failure to maintain close communication could result in injury to persons or property."<sup>162</sup> Such situations include the performance of surgery or drilling of oil wells, or the use of dangerous equipment.<sup>163</sup> While the courts have ruled on a few such situations,<sup>164</sup> there exists a large gray area of what constitutes legitimate business necessity or business justification.

A recent case filed by the Asian Pacific American Legal Center and the American Civil Liberties Union,<sup>165</sup> which will soon go to trial may help clarify these problem areas. Aida Dimaranan, an assistant head nurse on the maternity ward, was reprimanded several times for speaking Tagalog, a language of the Philippines, with fellow nurses.<sup>166</sup> While hospital administrators deny that there was ever a no-Tagalog, English-only policy on the maternity ward, Dimaranan's performance evaluations suffered after she criticized the policy. As a consequence she was reassigned to another position.<sup>167</sup> Only after an EEOC charge was filed, did the hospital administration attempt to clarify the language policy. The vice president for nursing services stated that hospital nurses could speak another language, but should exercise their "best professional judg-

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158. *Id.*

159. *Id.* at 657.

160. See *supra* notes 145-150 and accompanying text.

161. EEOC Guidelines, *supra* notes 122-23 and accompanying text.

162. EEOC Compliance Manual, *supra* note 133, at § 623-12.

163. *Id.*

164. In *Saucedo v. Brother Well Service, Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979), the court found that although requiring communications in English during a drilling operation was permissible, the company's termination of an employee for speaking two words of Spanish on the job in a dangerous situation violated Title VII. In *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) employee disc-jockey's claim failed when he refused to comply with the employer's decision to change the format of a radio program to English-only, instead of English and Spanish. Business necessity existed since the English-only order was motivated by market, rather than racial, considerations.

165. *Dimaranan v. Pomona Valley Hosp. Center*, No. CV 89-4299 ER(JRx). Plaintiff's trial brief. Telephone interview November 16, 1990 with Kathryn Imahara staff attorney with the Asian Pacific American Legal Center of Los Angeles, California.

166. *Id.* at 5-10.

167. *Id.* at 11-13.

ment."<sup>168</sup> No adequate definition of this term was given.<sup>169</sup>

The *Dimaranan* court must decide whether English-only laws constitute national origin discrimination. The court will also have the opportunity to set out the correct standard of business necessity or business justification. The requirements for notice as set out in the EEOC guidelines<sup>170</sup> will also be a central concern. Finally, the court must decide whether the English-only rule has an adverse impact on Filipino nurses.<sup>171</sup>

As more immigrants enter the work force, an increasing number of employers have instituted English-only rules prohibiting languages other than English in the workplace. In order to carry out the intent of Title VII, courts should adopt the EEOC Guidelines and recognize the close association between language and national origin. The long history of discrimination against members of language minority groups in the United States suggests that they, like persons whose race or religion differs from those of the majority, warrant protection under Title VII.

#### IV. MAJOR FEDERAL PROTECTION FOR LANGUAGE MINORITIES

Current English-only efforts are challenging government services for language minorities. Bilingual education and bilingual ballots are particularly singled out by English-only forces, since they are perceived as deterrents to learning English. Bilingual education obstructs students from learning English and bilingual ballots send an erroneous message to non-English speakers that they can participate in the political system without learning English.<sup>172</sup> Four major statutes in addition to Title VII of the 1964 Civil Rights Act, provide some protection for language minorities in the areas of education and voting. This section will briefly analyze the rights of language minorities under the Bilingual Education Act<sup>173</sup>, Title VI of the 1964 Civil Rights Act<sup>174</sup>, the Equal Education

168. *Id.* at 11. When asked about a situation of what "best professional judgment" meant, the vice president for nursing could not give a definition.

169. *Id.*

170. *Id.* at 20. The EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7(c) states: It is common for individuals whose primary language is not English to inadvertently change to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

171. *Id.* at 17.

172. See Califa, *supra* note 1, at 299-304, 312, 317-319 and Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M.L. REV. 17, 46 (1990).

173. 20 U.S.C. §§ 3281-3386 (1982).

174. 42 U.S.C. § 2000(d) (1982).

Act<sup>175</sup>, and the federal Voting Rights Act.<sup>176</sup>

### A. *The Bilingual Education Act*

The Bilingual Education Act was the first piece of federal legislation that recognized the fact that minority language children were not receiving an adequate education in schools that operated exclusively in English.<sup>177</sup> The new Title VII of the Elementary and Secondary Education Act, which became law in 1968, authorized resources to support educational programs, to train teachers and aides, and to develop appropriate instructional material. The focus of the law was children who were both poor and "educationally disadvantaged because of their inability to speak English."<sup>178</sup>

Although there was optimism surrounding the Bilingual Education Act, which passed through the Congress with remarkably little controversy, this optimism was short-lived.<sup>179</sup> Under pressure from the White House, Congress failed to approve funding for the bill during 1968.<sup>180</sup> In 1969, it appropriated \$7.5 million, which was only able to serve 27,000 children and to finance seventy-six projects.<sup>181</sup> By 1973, the act had benefitted only two percent of the nation's bilingual school children.<sup>182</sup> Since that time, the amount has increased to 200 million in 1989.<sup>183</sup> While more children have been served, the resources have been inadequate for the increased non-English speaking population.<sup>184</sup>

The Bilingual Education Act did not provide a right to bilingual education, rather it offered financial assistance for local bilingual programs designed to meet the needs of children with limited facility in English.<sup>185</sup> When the act did not prove to be the panacea, that many of its supporters had hoped it to be, parents of minority language children gradually turned to the federal courts to answer the question of whether there was a constitutional right to bilingual education.<sup>186</sup>

175. 20 U.S.C. §§ 1701-1758 (1982).

176. 42 U.S.C. §§ 1971-1974 (1982).

177. McFadden, *Bilingual Education and the Law*, 12 J.L. & EDUC. 1, 8 (1983).

178. CRAWFORD, *supra* note 30, at 32.

179. McFadden, *supra* note 177, at 8-9.

180. CRAWFORD, *supra* note 30, at 33.

181. *Id.*

182. McFadden, *supra* note 177, at 8.

183. 47 U.S.C. § 3282(b).

184. See CRAWFORD, *supra* note 30, at 70-84 for the negative responses of William Bennett, the former Secretary of Education, toward the funding of the Bilingual Education Act. He was particularly opposed to bilingual programs, which used the mother tongue in the teaching of limited non-English speaking students.

185. 20 U.S.C. §§ 3221-3261 (1982). See also Cordero, *supra* note 172, at 47.

186. McFadden, *supra* at note 177, at 8-10.

B. *The Constitutional Issue Avoided: Lau and Title VI*

In *Lau v. Nichols*, the Supreme Court held that placing non-English speaking students in a classroom with no special assistance and providing them with instruction that was not comprehensible to them violated Title VI of the federal Civil Rights Act of 1964.<sup>187</sup> In *Lau*, a class of approximately 1800 non-English speaking Chinese students in the San Francisco schools raised an equal protection claim and a claim under Title VI.<sup>188</sup> Title VI prohibits discrimination based on "race, color or national origin [in] any program or activity receiving Federal financial assistance."<sup>189</sup> In its analysis, the Supreme Court observed the importance of the English language in the California educational scheme. English fluency was a prerequisite for high school graduation. School attendance was compulsory. Furthermore, English as the basic language of instruction was mandated by the state.<sup>190</sup> Given these state-imposed standards, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>191</sup> For Judge Blackmun, numbers were also "at the heart of [the] case."<sup>192</sup>

In reaching this conclusion the *Lau* court relied on the guidelines promulgated by the Department of Health, Education and Welfare, in addition to Title VI. The guidelines required that school districts take affirmative steps to address the language needs of minority language children. Failure to rectify language deficiencies constitute discrimination on the basis of national origin, even if it is not deliberate.<sup>193</sup> The Court did not resolve the question of whether the failure to provide educational assistance to non-English speaking students violated the Constitution. As the only Supreme Court case on the issue of the right of language minority children to an equal education, the *Lau* case established guidelines for similar cases. Courts tended to: 1) avoid the constitutional issue; 2) rely on the discriminatory effect rationalization of Title VI; 3) choose a remedy on a case-by-case basis; and 4) take into account the number of students involved.<sup>194</sup>

In *Serna v. Portales*,<sup>195</sup> the Tenth Circuit closely followed the reasoning in *Lau*, ruling on Title VI rather than constitutional grounds. The

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187. 414 U.S. 563 (1974).

188. *Id.* at 564-66.

189. 42 U.S.C. § 2000(d) (1982).

190. 414 U.S. at 566.

191. *Id.*

192. *Id.* at 572.

193. *Id.* at 567.

194. McFadden, *supra* at note 177, at 10.

195. 499 F.2d 1147 (10th Cir. 1974).

*Serna* court noted that the children were required to attend schools where classes were conducted in English. Since it failed to provide remedial measures to meet the needs of Mexican-American students, the Portales school curriculum was discriminatory and in violation of Title VI and the HEW regulations.<sup>196</sup> While there appears to be a limited right to rectify language deficiencies where school policies have had the effect of discriminating against national origin minorities under Title VI, there is not an absolute right to bilingual education. In school districts with both language and racial minorities, conflicting remedies present difficult problems. In 1975, one year after approving a bilingual education remedy in *Serna*, the Tenth Circuit overturned a court decision implementing a bilingual program in *Keyes v. School District No. 1*.<sup>197</sup> The court differentiated this case from *Lau* and *Serna* in that the Denver school authorities "made an effort to identify students with language difficulties and directed several program to their needs . . . ."<sup>198</sup> What was more important, however, was the fact that the bilingual instruction remedy had been part of a larger desegregation plan. In order to maintain the bilingual education program, it would have been necessary to leave four elementary schools with significant minority enrollments. Faced with the reality of choosing between bilingual education and desegregation, the *Keyes* court decided that "such instruction must be subordinate to a plan of school desegregation."<sup>199</sup> With the future of *Lau* remedies increasingly uncertain, there has been more reliance on the Equal Educational Opportunity Act of 1974. Shortly after the *Lau* decision, Congress in effect codified the Supreme Court's holding.

### C. *The Equal Educational Opportunities Act*

Section 1703(f) of the Equal Educational Opportunities Act, requires school districts to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>200</sup> Soon after the passage of section 1703(f) the Fifth Circuit held that a violation of this act requires no discriminatory intent on the part of school authorities, simply a failure to take "appropriate action."<sup>201</sup> The courts have been split, however, on the form that this "appropriate" action must take. In 1978, the district court for the Eastern District of New York, in *Cintron v. Brentwood Union Free School District* held that where a bilingual program is implemented under section 1703(f), it must include instruction in the child's native language in most

196. *Id.* at 1153-54.

197. 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

198. 521 F.2d at 483.

199. *Id.* at 480.

200. 20 U.S.C. § 1703(f) (1990).

201. *Morales v. Shannon*, 516 F.2d 411, 415 (5th Cir. 1975).



subjects.<sup>202</sup> The Ninth Circuit, on the other hand, in *Guadalupe Organization, Inc. v. Tempe Elementary School*, concluded that appropriate action under 1703(f) need not be bilingual-bicultural education staffed with bilingual instructors.<sup>203</sup> The English as a second language (ELS) program proposed for the Arizona school district qualifies as an appropriate program for English-deficient children.<sup>204</sup>

The interpretation of 1703(f) was clarified in the 1981 Fifth Circuit case of *Castaneda v. Pickard*.<sup>205</sup> Agreeing with *Cintrón*, the court held that it is not necessary for a school district to intentionally discriminate in order for 1703(f) to be invoked. It also determined that the type of "appropriate" compensatory languages programs should be left up to the state and local educational authorities.<sup>206</sup> Finally, the *Castaneda* court specified that at a minimum schools must have a program predicated on and "reasonably calculated" to implement a "sound" educational theory and must be adequate in actually overcoming language barriers of the students.<sup>207</sup> While Section 1703(f) of the Equal Education Opportunity Act provides some protection for language minorities, there is not a right to bilingual-bicultural education.

#### D. The Voting Rights Act

Another significant piece of legislation is the federal Voting Rights Act as amended in 1975 and extended in 1982.<sup>208</sup> In response to evidence of discrimination in voting directed at non-English speakers, in 1975 Congress modified the 1965 Voting Rights Act.<sup>209</sup> The 1975 Amendments required that state and local governments publish bilingual election materials when more than five percent of the voting-age residents were members of a single language minority, and the illiteracy rate in English of such groups was higher than the national average.<sup>210</sup> The 1975 Amendments have significantly increased voter participation by non-English speakers.<sup>211</sup> The Act, however, has proven inadequate to safe-

202. 455 F. Supp. 56, 63 (E.D.N.Y. 1978).

203. 587 F.2d 1022, 1030 (9th Cir. 1978).

204. *Id.*

205. 648 F.2d 989 (5th Cir. 1981).

206. *Id.* at 1009.

207. *Id.* at 1009-10.

208. 42 U.S.C. §§ 1971-1974 (1982).

209. Note, *Voting Rights and the Constitution: The Case Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1422 (1988).

210. 42 U.S.C. § 1973b(f) (1982). Under section b(f)(3-4), a jurisdiction is covered if over five percent of the voting-age citizens are members of a single language minority group and if the previous presidential election was conducted only in English and less than fifty percent of voting-age citizens were registered. Section 1973b(f)(c) also requires that more than five percent of voting-age citizens belong to a single language minority group. Coverage is triggered under this provision if either the jurisdiction-wide or statewide illiteracy rate exceeds the national rate.

211. R. BRISCHETTO, BILINGUAL ELECTIONS AT WORK IN THE SOUTHWEST 62-177 (1982).

guard thousands of non-English speakers. After a change in methodology in determining whether a person belongs to a minority group, roughly half of the counties previously covered were dropped from the requirement.<sup>212</sup> In California, for example, only seven counties meet the requirement: Los Angeles, San Francisco, and San Diego, do not meet the requisite five percent figure.<sup>213</sup> These cities are so large that despite the fact that a city like Los Angeles had 69,000 Spanish monolinguals in 1984, they do not total five percent of the population.<sup>214</sup>

### E. *Official English Laws and Challenges to Federal Programs*

While several federal constitutional amendments have been proposed by English-only proponents, they appear unlikely to win Congressional approval anytime soon.<sup>215</sup> Their purpose seems to be to advance the political agenda of U.S. English of eliminating bilingual education and bilingual ballots and other bilingual services. State English-only laws challenging federal statutes have rarely been interpreted by the courts. Most state English-only laws are broad statements making English the official language of the state.<sup>216</sup> One of the few state cases is a Illinois challenge to the Voting Rights Act. In *Puerto Rican Organization for Political Action v. Kusper*,<sup>217</sup> the court held that the Illinois statute was largely symbolic. In *Kusper* the court granted a preliminary injunction compelling the Chicago Board of Commissioners to provide assistance in Spanish to Puerto Rican citizens who were unable to read or understand English.<sup>218</sup> The 1965 Voting Rights Act and the 1970 amendment prohibit states from conditioning the right to vote of persons who attended school in Puerto Rico on their ability to read or understand English.<sup>219</sup> The board of election commissioners appealed, arguing that the injunction required them to violate the state's official English law.<sup>220</sup> The court held the statute to be purely symbolic, observing that it "appears with

212. Compare 28 C.F.R. § 55 app. (1980) with Voting Rights Act Amendments of 1982, 49 Fed. Reg. 25,887 (1984).

213. Note, *supra* note 218, at 1423, n.28.

214. *Id.*

215. See CRAWFORD, *supra* note 30, at 61.

216. See *supra* note 4 and accompanying text, the Arizona amendment was an exception to this general pattern.

217. 490 F.2d 575 (7th Cir. 1973).

218. *Id.* at 577.

219. 42 U.S.C. § 1973b(e)(1)(2). The Supreme Court upheld the constitutionality of this provision in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). This provision was also upheld in *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974). The court concluded that New York City's practice of conducting elections by preparing ballots, voting instructions and other election materials only in English, constituted a condition on the right to vote under the Voting Rights Act and deprived Puerto Ricans of their right to vote.

220. 490 F.2d at 577. The Illinois statute states: "The official language of the State of Illinois is English." ILL. REV. STAT. ch. 127, § 177.

others naming the state bird and the state song" it has "never been used to prevent publication of official materials in other languages."<sup>221</sup> The Gutierrez court came to a similar conclusion with respect to the California official English statute under Title VII.<sup>222</sup>

## V. CONCLUSION

The English-only movement, like the Americanization movement before it in the 1920s, has prompted a resurgence of anti-foreigner sentiment. Fuelled by high rates of immigration from Latin American and Asian countries, English-only forces have attempted to limit bilingual services and encourage English-only laws in the public and private sectors. They seek to limit bilingual education and bilingual ballots, and to enforce English-only rules in the workplace. In the second half of the twentieth century non-English speaking immigrants do have more legal language than those who entered before them. There is not a entitlement to language rights, however, either under the constitution or under the major federal statutes. The analysis has shown that courts have rejected challenges to language minorities unless they fall squarely within the scope of national origin discrimination. Statutes giving access to remedial education programs for those who lack proficiency in English have established a limited right for language minorities, however, these programs are not required to use instruction in the mother tongue of limited English-speaking students. The Voting Rights Act has mandated bilingual voting assistance for non-English speaking citizens, but many language minorities remain outside the requirements of this Act.

The legal effect of state official English laws remains unclear. Many of the state laws are very broad. Thus far courts have ruled that they are of symbolic value. If enforced, they could deprive language minorities of important rights in the workplace, voting booth, and in the education arena. English-only forces have been more successful in using the laws politically than in the courtroom. In California, the passage of Proposition 63 in 1986, the official English constitutional amendment, was employed to pressure the Governor into vetoing bilingual education legislation. On the other hand, the Attorney General in California rejected a demand by U.S. English to ban election materials published in Chinese and Spanish by San Francisco and other jurisdictions.<sup>223</sup> There remain many troubling aspects of the English-only movement and the official English laws. The laws have not done anything to increase proficiency of individuals with a limited knowledge of English. Rather than promote national unity and tolerance of Hispanic and Asian newcomers,

221. 490 F.2d at 577.

222. See *supra* note 110 and accompanying text.

223. See CRAWFORD, *supra* note 30, at 58.

the laws have promoted an anti-foreigner attitude among the population. Immigrants are perceived as refusing to assimilate and to learn the English language, even though studies show that most language minorities lose their mother tongues by the second or at most the third generation. There is a need to rethink to what extent one should have the “right to language”<sup>224</sup> independent of the national origin label. Unless there are proper safeguards for language minorities, U.S. English and allied groups will be able to promote a hidden agenda that has little to do with language.

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224. See the analysis in Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885 (1986).

