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### Fear of Foreigners: Nativism and Workplace Language Restrictions

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# Articles

MARK L. ADAMS\*

## Fear of Foreigners: Nativism and Workplace Language Restrictions

*[A]ll of our people all over the country, all except the pure-blooded Indians, are immigrants or descendants of immigrants, including even those who came over here on the Mayflower.*

—President Franklin D. Roosevelt<sup>1</sup>

*Everyone should speak English or just shut up, that's what I say.*

—Calvin, Calvin and Hobbes<sup>2</sup>

The workplace has emerged as the primary battleground of the official English movement and the civil rights of language minorities.<sup>3</sup> In recent years, the number of “speak English only” rules in the workplace has sharply increased.<sup>4</sup> As of June, 1994, the EEOC had approximately 120 active charges against 67 different employers who had imposed English-only rules.<sup>5</sup> While some of

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<sup>1</sup> *Text of Roosevelt's Final Campaign Address in Boston*, N.Y. TIMES, Nov. 5, 1944, at 38.

<sup>2</sup> Cartoon by Bill Watterson, Sept. 5, 1989 (United Press Syndicate 1989).

<sup>3</sup> Aileen Maria Ugalde, “No Se Habla Espanol”: *English-Only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209, 1233 (1990).

<sup>4</sup> Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 303 (1989) (attributing the rise in complaints about the rules to passage of California's official English amendment); Rob Gurwitt, *English-Only Campaign Is Spreading*, GOVERNING, Aug. 1988, at 67.

<sup>5</sup> Brief for the United States as Amicus Curiae, Petition for Writ of Certiorari at 15, *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994). For example, Chinese-American employees of a Los Angeles insurance

these rules are promulgated to promote worker safety, many are a response to the xenophobia of the official English movement and fear of employer sanctions under the Immigration Reform and Control Act ("IRCA").<sup>6</sup>

The controversy surrounding English-only rules in the world of employment, and the resultant litigation, can be understood only when examined from a historical perspective. The official English movement has been a reaction to the perceived threat from the increase in immigrants, principally Hispanic immigrants, and anti-immigrant sentiment has dramatically increased in recent years.<sup>7</sup> The perceived threat does not involve the English language, however, but rather the political concerns caused by unwanted foreigners.<sup>8</sup> These concerns result in members of ethnic

firm were ordered to speak in English unless they were assisting a Chinese-speaking customer. Margaret Carlson, *Only English Spoken Here*, TIME, Dec. 5, 1988, at 29. In Miami, Florida, a supermarket cashier was suspended for speaking in Spanish. Marshall Ingwersen, *English-Only Laws: How Broad?*, CHRISTIAN SCIENCE MONITOR, Nov. 29, 1988, at 3.

<sup>6</sup> 8 U.S.C. § 1255a(a) (1988 & Supp. II 1990); 8 U.S.C. § 1324a (1988 & Supp. II 1990).

<sup>7</sup> Ruth Conniff, *The War on Aliens: The Right Calls the Shots*, PROGRESSIVE, Oct. 1993, at 22; Penny Loeb, et al., *To Make a Nation*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 47; Tim Weiner, *On These Shores, Immigrants Find a New Wave of Hostility*, N.Y. TIMES, June 13, 1993, at D4 (reaction against immigrants flourishes in times of economic and political uncertainty).

<sup>8</sup> See Tom McArthur, Comment, *Worried About Something Else*, 60 INT'L J. SOC. LANGUAGE 87, 91 (1986):

[Supporters of the English-only movement] have never felt the need to make English the official language of the United States in response to the agitation of the French in Maine, angry Injuns at Wounded Knee, aggrieved Hawaiians, or any other tiny minority. They only defend . . . English . . . when it is threatened by the one other linguistic tool that signifies . . . the Americas. . . .

. . . .  
Spanish is the language of masses perceived variously as illiterate, impoverished, dirty, backward, criminally inclined, residually Roman Catholic, prone to Communist infiltration, dark-complexioned, and now pushing cocaine and marijuana north for all they are worth.

There does not have to be much rationality in the response to such fears, but it can help to make fears tidy and manageable if one talks in an apparently rational manner about the Constitution and safeguarding the nation's language—English . . . .

See also J.A. Fishman, *"English Only": Its Ghosts, Myths and Dangers*, 74 INT'L J. SOC. LANGUAGE 125, 133 (1988) (positing that Anglo insecurity is caused by America's diminished international stature, poor economic performance, and fears regarding social mobility for the next generation); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 311 (1986):

In America hostility among cultural groups . . . is properly seen as a threat to [national] unity. . . . Those who react to cultural differences with fear or

minority groups who are legal immigrants and citizens often being perceived as illegal immigrants.<sup>9</sup> Historically, increases in the rate of immigration by non-English-speaking groups have resulted in a corresponding increase in intolerant acts by the English-speaking majority.<sup>10</sup> While judicial analysis of English-only policies and claims of national origin discrimination have focused primarily on an individual's ancestry, the concept of national origin should include the cultural traits associated with that ancestry, such as language.<sup>11</sup>

In 1991, 1,827,200 immigrants came to the United States: 946,200 were from Mexico; 358,500 were from Asia; and only 135,200 emigrated from Europe.<sup>12</sup> Between 1980 and 1990, the number of Hispanics in the United States increased by 53% and the number of Asians by 107.9%.<sup>13</sup> Estimates project that by the year 2000 a majority of California's population will be members of racial and ethnic minorities.<sup>14</sup> These figures of course do not include the approximately 300,000 illegal immigrants entering the country each year, most of whom are from Mexico and Central America.<sup>15</sup>

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anger generally espouse nativist policies designed to repress the differences by excluding the "others" from the country, by forcing them to conform to the norms of the dominant culture, or by relegating them to a subordinate status in society.

<sup>9</sup> Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 356 (1994).

<sup>10</sup> Kathryn K. Imahara & Ki Kim, *English Only—Racism in Disguise: An Analysis of Dimaranan v. PVHMC*, 23 U. WEST L.A. L. REV. 107, 108 (1992).

<sup>11</sup> See Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1166 (1985); see, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), cert. denied, 114 S. Ct. 2726 (1994); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981).

<sup>12</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 11.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> Karst, *supra* note 8, at 304 n.6 (citing CENTER FOR CONTINUING STUDY OF THE CALIFORNIA ECONOMY, PROJECTIONS OF HISPANIC POPULATION FOR CALIFORNIA, 1985-2000. WITH PROJECTIONS OF NON HISPANIC, WHITE, BLACK AND ASIAN & OTHER POPULATION GROUPS 23 (1982)).

<sup>15</sup> Ronald Brownstein & Richard Simon, *Hospitality Turns into Hostility*, L.A. TIMES, Nov. 14, 1993, at A1, A6; Arthur F. Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, in U.S. IMMIGRATION POLICY 223, 248-50 (Richard R. Hofstetter ed., 1984). One study estimates that between 7,979,000 and 9,900,000 people have settled in the United States illegally, with 80% from Latin America and the Caribbean and two-thirds of the total from Mexico. *Id.* Another study, however, places the number between only 2 million and 4 million. Gaylord Shaw, *Number of Illegal Aliens in U.S. May Be as Low as 2 Million*, *New Study Contends*, L.A. TIMES, June 25, 1985, Section I, at 4.

In 1980, the population of the United States, excluding infants, was 210,247,455.<sup>16</sup> Eighty-nine percent of the population (187,187, 415) spoke only English at home, and 11% (23,060,040) spoke a language other than English at home.<sup>17</sup> More than 11 million of those spoke Spanish.<sup>18</sup> Eighty-five percent of the population claimed English as their mother tongue, while less than one percent (.57%) of the total population could not speak any English.<sup>19</sup> Spanish, German, Italian, French, Polish, and Yiddish were the next most frequently claimed mother tongues in the 1970 and 1979 Bureau of the Census data.<sup>20</sup> Additionally, 121 self-proclaimed "ancestry groups" spoke 385 languages and dialects, and 204 foreign-language newspapers were published.<sup>21</sup>

As of 1985, there were at least 13.2 million Spanish speakers in the United States.<sup>22</sup> Today, the United States contains the fourth or fifth largest Spanish-speaking population in the world, with estimates ranging from 18 to 30 million.<sup>23</sup> By the end of the decade, Hispanics will be the largest ethnic minority group in the United States, constituting a significant portion of the work force.<sup>24</sup>

Section I of this Article discusses the history of languages in the United States and the recent official English movement. Section II examines the protections established against national origin employment discrimination and the rights of language minorities. Section III analyzes the approach of the EEOC and the courts to the issue of English-only rules in the workplace. Section IV examines English-only rules under disparate impact analysis, the appropriate degree of deference given to the EEOC Guidelines, and the business justification defense. Finally, Sec-

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<sup>16</sup> BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION tbl. 99 (1984) [hereinafter 1980 CENSUS].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Fishman, *supra* note 8, at 129; 1980 CENSUS, *supra* note 16, tbl. 99.

<sup>20</sup> *Mother-Tongue Claiming in the United States Since 1960: Trends and Correlates*, in *THE RISE AND FALL OF THE ETHNIC REVIVAL: PERSPECTIVES ON LANGUAGE AND ETHNICITY* 111, 145-48 (Joshua A. Fishman et al. eds., 1985).

<sup>21</sup> *The Golden Door*, HARPER'S MAG., Mar. 1984, at 47.

<sup>22</sup> BILL PIATT, ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES 26 (1990).

<sup>23</sup> THOMAS WEYR, HISPANIC U.S.A.: BREAKING THE MELTING POT 3 (1988).

<sup>24</sup> Peter Cattani, *The Growing Presence of Hispanics in the U.S. Work Force*, MONTHLY LAB. REV., Aug. 1988, at 9; Diego Ribadeneira, *Boom Bypassing Mass. Hispanics*, BOSTON GLOBE, June 5, 1988, Metro, at 1.

tion V explores the relationship between an individual's primary language and his or her national origin.

## I

### HISTORICAL PERSPECTIVE ON LANGUAGES IN THE UNITED STATES AND THE OFFICIAL ENGLISH MOVEMENT

#### A. *History of Languages in the United States*

Historically, the United States has been plagued by pervasive discrimination against certain national origin groups, particularly Hispanic and Chinese.<sup>25</sup> Because threats to majority economic interests create a need for scapegoats and provide the "emotional fuel for hostile action,"<sup>26</sup> members of language and cultural minorities have faced a torrent of nativist hostility due to their differences in language, ethnicity, and religion.<sup>27</sup> Language

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<sup>25</sup> See *Gomez v. City of Watsonville*, 852 F.2d 1186, *withdrawn, re-reported* at 863 F.2d 1407, 1419 (9th Cir. 1988) (stating that if necessary for the decision, the court "would consider the propriety of taking judicial notice of the pervasive discrimination against Hispanics in California"), *cert. denied*, 489 U.S. 1080 (1989); *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986) (stating "courts have long recognized the history of discriminatory treatment inflicted on Chinese and Hispanic people"), *vacated for mootness*, 484 U.S. 806 (1987); *Hernandez v. Texas*, 347 U.S. 475, 479-82 (1954) (holding that individuals of Mexican or Latin American descent were discriminated against in jury selection); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that municipal ordinance regulating public laundries discriminated against Chinese immigrants).

<sup>26</sup> Karst, *supra* note 8, at 310; STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 170 (1981) ("If there is an iron law of ethnicity, it is that when ethnic groups are found in a hierarchy of power, wealth, and status, then conflict is inevitable."). For example, White labor union leaders brutally treated Chinese laborers in nineteenth century California. MALDWIN A. JONES, *AMERICAN IMMIGRATION* 248-49 (1960); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971) (discussing the rationalization for the mistreatment of Chinese immigrants). For a discussion of early immigration laws directed at the Chinese, see SHIH-SHAN HENRY TSAI, *THE CHINESE EXPERIENCE IN AMERICA* 56-81 (1986). Similarly, Slavic workers were attacked in the late nineteenth century in the Pennsylvania coal fields. JONES, *supra*, at 256-57. During World War II, an association of growers and farmers and some labor unions provided strong political support for the internment of Japanese-Americans. FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 217 (1962); MORTON GRODZINS, *AMERICANS BETRAYED* 19-91 (1949). Economic interests also inspired the 1913 California law prohibiting aliens ineligible for citizenship, principally Asians, from owning land. JONES, *supra*, at 253-54; Karst, *supra* note 8, at 310 n.32; JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1968) (analysis of the internment process).

<sup>27</sup> Karst, *supra* note 8, at 352 ("A distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American his-

restrictions have often been used as a means to dominate a national origin group.<sup>28</sup>

Although English traditionally has been the de facto primary language in this nation,<sup>29</sup> multiple languages and cultures have flourished in the United States since its initial population by Native-Americans, who spoke hundreds of different languages and developed varied cultures.<sup>30</sup> Today, more than 200 Native American languages are still spoken and studied.<sup>31</sup> The story of the suppression and elimination of native cultures provides a tragic example of the treatment of and hostility towards perceived "outsiders."<sup>32</sup>

European colonists brought even more languages, with Ger-

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tory: discrimination against members of the cultural minority."). Professor Karst further states:

In all times and places, cultural differences have bred suspicion and fear. In times of trouble, those fears tend to focus on particular groups of cultural outsiders as a source of danger. It becomes convenient to make scapegoats of "them"—the people who look different from "us" or whose language or behavior is foreign to our own. Cultural majorities have sought to force outsiders to conform to the prevailing cultural norms; alternatively, they have sought to dominate and suppress the outsiders, separating them from the public life of the community.

*Id.* at 305. For a discussion of the relationship between nativism and immigration, see JONES, *supra* note 26, at 147-76, 247-77; JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (2d ed. 1965); Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, in *U.S. IMMIGRATION POLICY* 137, 140-55 (Richard R. Hofstetter ed., 1984).

<sup>28</sup> Myres S. McDougal et al., *Freedom from Discrimination in Choice of Language and International Human Rights*, 1976 *ILL. U. L.J.* 151, 153 ("Suffocation of language has always been part of [the] policies of domination and the struggle for its maintenance was always a precondition for any political movement of liberation.").

<sup>29</sup> In fact, two out of three Americans believe that English is already the official language of the United States. Califa, *supra* note 4, at 293, citing Carelli, *Survey: Most Think English Is Official U.S. Language*, ASSOC. PRESS, Feb. 14, 1987.

<sup>30</sup> NANCY FAIRES CONKLIN & MARGARET A. LOURIE, *A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES* 6 (1983) (discussing the history of language communities in the United States up to the present).

<sup>31</sup> William L. Leap, *American Indian Languages*, in *LANGUAGE IN THE USA* 116, 116-44 (Charles A. Ferguson & Shirley Brice Heath ed., 1981) (describing the variety of Native American languages).

<sup>32</sup> See generally WILLIAM T. HAGAN, *AMERICAN INDIANS* (rev. ed. 1979) (discussing the suffering of Native Americans from encounters with settlers during colonial times through the New Deal era); Irene K. Harvey, Note, *Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 *AM. INDIAN L. REV.* 117 (1982) (stating need for control of "inferior" races invigorated Congress' unrestrained power over Native Americans); VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 1-24 (1983) (providing a history of national policy regarding Native Americans).

man, Spanish, French, Dutch, and Swedish all serving as official languages in different regions of the United States during the colonial era.<sup>33</sup> Perhaps because of this tradition of linguistic diversity, the Constitution fails to mention an official language. The framers purposely did not give special recognition to English due to the connection between language and liberty.<sup>34</sup> In fact, the Continental Congress issued official publications, including the Articles of Confederation, in French, German, and English during the Revolutionary War era.<sup>35</sup>

Yet a conflict existed between the Jeffersonian view of individual liberty and the movement towards assimilation and Americanization.<sup>36</sup> Jefferson, who was fluent in French and studied the Anglo-Saxon language, viewed ability in several languages as necessary for politics and law.<sup>37</sup> In contrast, John Adams proposed a national language academy designed to establish standards for the English language; however, his proposal was rejected because of the conflict between government regulation of language and freedom of speech.<sup>38</sup> The demand for assimilation was expressed by John Jay in *The Federalist*: "Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . . ."<sup>39</sup> The purchase and conquest of territories from France, Mexico, and Spain caused increased con-

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<sup>33</sup> CONKLIN & LOURIE, *supra* note 30, at 3-58.

<sup>34</sup> Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 274 (1992); see also Shirley Brice Heath, *Language and Politics in the United States*, in LINGUISTICS AND ANTHROPOLOGY 267, 270 (Muriel Saville-Troike ed., 1977) ("[E]arly political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction of these freedoms."); David F. Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 INT'L J. SOC. LANGUAGE 7, 10-11 (1986).

<sup>35</sup> Perea, *supra* note 34, at 285-86.

<sup>36</sup> *Id.* at 276, 293 n.104.

<sup>37</sup> *Id.* at 289 ("With respect to modern languages, French . . . is indispensable. Next to this the Spanish is most important to an American.") (quoting letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (July 6, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 494, 557 (Julian A. Boyd et al. eds., 1950)).

<sup>38</sup> Shirley Brice Heath, *A National Language Academy? Debate in the New Nation*, 11 INT'L J. SOC. LANGUAGE 19, 22 (1976); Marshall, *supra* note 34, at 11.

<sup>39</sup> THE FEDERALIST No. 2, at 94 (John Jay) (Benjamin Fletcher Wright ed., 1961).



cern regarding other languages.<sup>40</sup> For example, before Louisiana could become a state, Congress required that the state constitution provide that all legislative and judicial documents be recorded in English.<sup>41</sup>

During the eighteenth and most of the nineteenth centuries, German was the most widely spoken language after English and served as an important language in public and private life.<sup>42</sup> In 1870, the United States Commissioner of Education recognized the importance of the German language: “[T]he German language has actually become the second language of our Republic, and a knowledge of German is now considered essential to a finished education.”<sup>43</sup> In Pennsylvania, “German schools received public funding well into the nineteenth century.”<sup>44</sup> However, the strength of the German language and the foreign-born population was not always viewed in positive terms.<sup>45</sup> For example, in 1727 Germans were required to sign a loyalty oath in Pennsylvania.<sup>46</sup> In 1798, in response to the threat of war with France, Congress extended the period for naturalization from two to fourteen years.<sup>47</sup> Because of a fear that aliens were engaging in “treasonable or secret machinations against the government,”<sup>48</sup> Congress at the same time passed the Alien and Sedition Acts, which gave the President authority to seize and deport any alien without accusation or hearing and made forceful criticism of government officials a crime.<sup>49</sup> Jefferson described the Acts as “a

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<sup>40</sup> Bernard J. McFadden, *Bilingual Education and the Law*, 12 J. L. & EDUC. 1, 6-7 (1983).

<sup>41</sup> Stephen T. Wagner, *America's Non-English Heritage*, 19 SOCIETY 37, 39 (1972).

<sup>42</sup> Califa, *supra* note 4, at 293, 296-97; Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657, 659 (1987).

<sup>43</sup> Califa, *supra* note 4, at 297.

<sup>44</sup> CONKLIN & LOURIE, *supra* note 30, at 65.

<sup>45</sup> Note, “Official English”: *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1348-49 n.23 (1987) [hereinafter *Official English*] (quoting Benjamin Franklin’s anti-German sentiment: “[W]hy should the Palatine [German] boors be suffered to swarm in our settlements and, by herding together, establish their language and manners to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of *aliens*, who will shortly be so numerous as to germanize us instead of our anglicizing them?”).

<sup>46</sup> JONES, *supra* note 26, at 47-48.

<sup>47</sup> Naturalization Act of 1795, ch. 54, § 1, 1 Stat. 566 (1778), *repealed by* Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153, 153-54 (1802).

<sup>48</sup> JANE PERRY CLARK, *DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE* 37 (1931).

<sup>49</sup> Alien and Sedition Act, ch. 66 § 1, 1 Stat. 577 (1798), *repealed by* ch. 28, § 5, 2 Stat. 155 (1802).

most detestable thing."<sup>50</sup> Although the Alien Act was never enforced, foreign-born critics of the government were prosecuted under the Sedition Act.<sup>51</sup>

Beginning in the 1890s, an increasingly negative sentiment developed against non-English-speaking immigrants from Southern and Eastern Europe due to their different religions and cultures.<sup>52</sup> A government-sponsored commission in 1911 contrasted the "old" immigrants from Scandinavia and Germany (stable, industrious, and easily assimilated) with the "new" immigrants (less intelligent, too urban, transient, and difficult to assimilate).<sup>53</sup> The new immigrants were predominantly Roman Catholic and Orthodox in contrast to the earlier Anglo-Saxon and Protestant settlers.<sup>54</sup> At the same time, the United States was transforming from an agricultural to an industrial nation, creating greater competition for jobs and fears of economic recession. The combination of these religious and economic fears caused an increased nativist sentiment and a commensurate effort to Americanize the foreigners.<sup>55</sup> The Americanization movement focused on restricting non-English languages by creating English language requirements for voting, employment, and education.<sup>56</sup> After vetoes by three consecutive presidents, Congress in 1917 enacted a provision requiring a literacy test for immigrants in an effort to restrict the number of immigrants from Southern and Eastern Europe.<sup>57</sup>

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<sup>50</sup> Letter from Thomas Jefferson to James Madison (May 31, 1798), in 10 THE WRITINGS OF THOMAS JEFFERSON 41 (Andrew A. Lipscomb ed., 1903).

<sup>51</sup> Karst, *supra* note 8, at 317.

<sup>52</sup> CONKLIN & LOURIE, *supra* note 30, at 34; Marshall, *supra* note 34, at 12.

<sup>53</sup> Califa, *supra* note 4, at 297 n.23; see also KENJI HAKUTA, MIRROR OF LANGUAGE: THE DEBATE ON BILINGUALISM 17 (1986) (statement of Francis A. Walker, former president of MIT) ("These immigrants are beaten men from beaten races, representing the worst failures in the struggle for existence. . . . Europe is allowing its slums and its most stagnant reservoirs of degraded peasantry to be drained off upon our soil.").

<sup>54</sup> Califa, *supra* note 4, at 297 n.23; HAKUTA, *supra* note 53, at 16-17.

<sup>55</sup> Marshall, *supra* note 34, at 12 (describing a "newly defined ethnocentricity"); see also Joseph Leibowicz, Note, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 533-39 (1985) (discussing the role of English language education in the Americanization movement). For a definition of nativism, see HIGHAM, *supra* note 27, at 4: "[I]ntense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections. . . . While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life."

<sup>56</sup> Leibowicz, *supra* note 55, at 533-34.

<sup>57</sup> Immigration Act of 1917, 39 Stat. 874, 877, 8 U.S.C. § 136 (1946), *repealed*, 66

In contrast to these efforts, several states officially recognized languages other than English. Because of the large and influential German population, Pennsylvania published many state laws and other documents in German and gave legal recognition to the German language in several statutes.<sup>58</sup> California and New Mexico gave similar recognition to Spanish, while Louisiana recognized French.<sup>59</sup> For example, California's first constitution provided for the publishing of laws in both Spanish and English.<sup>60</sup> In 1879, however, the rapid increase in English speakers brought to California by the gold rush eroded the influence of the Spanish-speaking natives, and the California Constitution was changed to prohibit the publication of laws in a language other than English.<sup>61</sup> Because of its long-standing connection to Hispanic culture, New Mexico published its laws in English and Spanish until 1953, and today continues to recognize the importance of its bilingual history and culture:

[t]he state of New Mexico hereby reaffirms its advocacy of the teaching of other language in the United States and its belief that the position of English is not threatened. Proficiency on the part of our citizens in more than one language is to the economic and cultural benefit of our state and the nation . . . . Proficiency in English plus other languages should be encouraged throughout the state.<sup>62</sup>

In Louisiana, the Constitution of 1974 recognized the right of residents "to preserve, foster, and promote their respective historic linguistic and cultural origins."<sup>63</sup>

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Stat. 279, 280 (1952) (The test worked to exclude "[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish . . ."). Statements made in Congress at that time have a frightening similarity to Nazi propaganda from World War II: "If, therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY 1924-1952*, at 15 (1957).

<sup>58</sup> Perea, *supra* note 34, at 310-315.

<sup>59</sup> *Id.* at 309.

<sup>60</sup> CAL. CONST. art. XI, § 21 (1849), *reprinted in* JOHN ROSS BROWNE, *REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION* app. (photo. reprint 1973) (1850) ("All laws, decrees, regulations, and provisions, which from their nature require publication, shall be published in English and Spanish.").

<sup>61</sup> CAL. CONST. art. IV, § 24 (repealed 1966); *see also* Perea, *supra* note 34, at 319.

<sup>62</sup> PIATT, *supra* note 22, at 25 (quoting *Supporting Language Rights in the United States*, Resolution of the New Mexico Legislature (1989)).

<sup>63</sup> LA. CONST. art. XII, § 4. For a discussion of the history of bilingualism in these states, *see* Perea, *supra* note 34, at 309-28.

By World War I, nativist fervor and the level of suspicion against foreigners increased significantly.<sup>64</sup> For example, Iowa required the use of English in all telephone conversations, schools, and church services, while several other states prohibited the use of non-English languages in both public and private schools.<sup>65</sup> By 1919, fifteen states had banned the teaching of foreign languages.<sup>66</sup> For example, a Nebraska statute stated that “[n]o person . . . shall teach any subject to any person in any language other than the English language . . . .”<sup>67</sup> The Supreme Court reversed a parochial teacher’s conviction under the statute for reading bible stories in German.<sup>68</sup> Many states also required

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<sup>64</sup> Michele Arington, Comment, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J. L. & POL. 325, 330 n.36 (1991).

<sup>65</sup> *Id.*; CONKLIN & LOURIE, *supra* note 30, at 70.

<sup>66</sup> HIGHAM, *supra* note 27, at 260. For a discussion of the legal restrictions on German language and culture during World War I, see Perea, *supra* note 34, at 329-32.

<sup>67</sup> 1919 Neb. Laws 249.

<sup>68</sup> *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923). In *Meyer*, the state 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.” See Carol Schmid, Comment, *Language Rights And The Legal Status Of English-Only Laws In The Public And Private Sector*, 20 N.C. CENT. L.J. 65, 70 (1992) (quoting Brief and Argument of State of Nebraska, Defendant in Error, at 12-13, *Meyer v. Nebraska*, 262 U.S. 390 (1923)). The Court reversed the conviction, stating:

[T]he individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

*Meyer*, 262 U.S. at 401. Striking down similar statutes in Ohio and Iowa at the same time, the Court held that the statute violated the Due Process Clause of the Fourteenth Amendment because it interfered with the profession of language teachers, with parents’ control over the education of their children, and with the child’s own education. *Id.* at 399. See *Bartels v. Iowa*, 262 U.S. 404, 409 (1923). *Meyer* still stands for the proposition that a government invasion of personal identity and freedom will be found invalid if it is directed at discrete and insular minorities outside the normal political process. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1319-20 (2d ed. 1988). Language minorities have not been recognized as a suspect class for equal protection purposes. See *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Or. 1973) (holding that a tavern’s policy against the speaking of any “foreign” language was unlawful racial discrimination against Mexican-Americans). The court rejected the tavern owner’s argument that the English-only rule was justified because of the other customers’ irritation with Spanish-speaking patrons, stating:

Just as the Constitution forbids banishing blacks to the back of the bus so as not to arouse the racial animosity of the preferred white passengers, it

teachers to be citizens.<sup>69</sup> Because of these restrictions, the number of students studying German fell from approximately 324,000 in 1915 to less than 14,000 in 1922.<sup>70</sup> Language restrictions also affected the public education of Asian and Hispanic children.<sup>71</sup> In the Southwest, "Mexican-American children were prohibited from speaking their native language anywhere on school grounds. Those who violated the 'No Spanish' rule were severely punished."<sup>72</sup> Similarly, native French-speaking students were severely punished for speaking in French.<sup>73</sup> Children of language minority groups were also segregated into separate and unequal schools.<sup>74</sup> Continuing even into the present, this segregation of minority language group students and suppression of native languages results in an especially high dropout rate for

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also forbids ordering Spanish-speaking patrons to the "back booth or out" to avoid antagonizing English-speaking beer-drinkers.

... Catering to prejudice out of fear of provoking greater prejudice only perpetuates racism. Courts faithful to the Fourteenth Amendment will not permit, either by camouflage or cavalier treatment, equal protection so to be profaned.

*Hernandez*, 368 F. Supp. at 755-56. For arguments that official English laws violate the Equal Protection Clause, see Arington, *supra* note 64, at 335-37 ("To the extent, therefore, that courts identify English-only laws as creating a language-based distinction which merely disguises underlying racially or ethnically motivated discrimination, such laws may be, and should be, invalidated under the fourteenth amendment [sic]"); Califa, *supra* note 4, at 330-46; Perea, *supra* note 34, at 356-71.

<sup>69</sup> Karst, *supra* note 8, at 314. These bans were later declared unconstitutional. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer*, 262 U.S. 390.

<sup>70</sup> Wagner, *supra* note 41, at 41.

<sup>71</sup> See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 197-98 (1973); *United States v. Texas Educ. Agency*, 467 F.2d 848, 853 (5th Cir. 1972) (en banc); *Cisneros v. Corpus Christi Indep. School Dist.*, 467 F.2d 142, 144 (5th Cir. 1972) (en banc); *Soria v. Oxnard School Dist.*, 328 F. Supp. 155 (C.D. Cal. 1971); see also Jorge C. Rangel & Carlos M. Alcala, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 379 (1972); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 711-15 (1975).

<sup>72</sup> *United States v. Texas*, 506 F. Supp. 405, 412 (E.D. Tex. 1981), *rev'd on other grounds*, 680 F.2d 356 (5th Cir. 1982). Into the 1950s, "children who spoke Spanish in school were made to kneel on upturned bottle caps, forced to hold bricks in outstretched hands in the schoolyard, or told to put their nose in a chalk circle drawn on a blackboard. And this would happen in Texas towns that were 98 percent Spanish-speaking." WEYR, *supra* note 23, at 52.

<sup>73</sup> See James H. Domengeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1154-55 (1986).

<sup>74</sup> See *United States v. Texas*, 506 F. Supp. at 411 ("[S]egregation of Mexican-Americans is a historical fact in Texas public schools."); Greenfield & Kates, *supra* note 71, at 714 n.299.

those students.<sup>75</sup> These language and cultural restrictions have a detrimental impact on language minority children.<sup>76</sup> Regarding a school policy which effectively prohibited Native American students from wearing long, braided hair, Justice Douglas wrote:

The results of such a policy . . . to force all students into one homogeneous mold even when it impinges on their racial and cultural values, have been disastrous for the young Indian child who is taught in school that the culture in which he has been reared is not important or valid.<sup>77</sup>

In addition, expert testimony demonstrates that "a child who goes to a school where he finds no evidence of his language and culture and ethnic group represented becomes withdrawn and nonparticipating."<sup>78</sup>

During World War I and the Red Scare of 1919-1920, the government and private organizations attempted to coerce "Americanization" by pressuring immigrants to become citizens, abandon their native languages, and demonstrate a "conformist loyalty intolerant of any values not functional to it."<sup>79</sup> Efforts included workers being compelled by their employer to become citizens and abandon Old World dress and manners.<sup>80</sup> Congress also doubled the income tax on "non-resident aliens."<sup>81</sup> Even more coercive measures were introduced in Congress but failed to pass, including the deportation of aliens who did not apply for citizenship or learn English, as well as the "suppression of the foreign-language press, mass internments, [and] the denial of industrial employment to aliens."<sup>82</sup>

In 1924, Congress enacted legislation over a presidential veto

<sup>75</sup> See Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 MICH. J. L. REF. 265, 284-85 n.115 (1990).

<sup>76</sup> See *Serna v. Portales Mun. Schools*, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

<sup>77</sup> *New Rider v. Board of Educ.*, 414 U.S. 1097, 1102-03 (1973) (Douglas, J., dissenting from denial of certiorari).

<sup>78</sup> *Serna*, 499 F.2d at 1150.

<sup>79</sup> HIGHAM, *supra* note 27, at 247; see also Leibowicz, *supra* note 55, at 538 ("The fact that language can be used as an offensive and ugly weapon against foreign-language speakers, whether through political, economic, or educational requirements, is, however, an unavoidable lesson of the Americanization movement.").

<sup>80</sup> HIGHAM, *supra* note 27, at 235-50.

<sup>81</sup> Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062 (1919), *revised and superseded by* 42 Stat. 320 (1921).

<sup>82</sup> HIGHAM, *supra* note 27, at 250; see also Karst, *supra* note 8, at 314 n.54 ("The National Americanization Committee further recommended congressional legislation requiring semiannual registration of the whole population and internment of those who had 'anti-American' sympathy.") (citing HIGHAM, *supra* note 27, at 249).

which established national origin quotas for immigration.<sup>83</sup> By establishing quotas based on the prospective immigrant's country of origin, Congress sought to restrict immigration by non-northern European people.<sup>84</sup> President Truman strongly opposed the national origin quotas in his message vetoing the McCarran-Walter Immigration Act:

[T]he idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that 'all men are created equal.'<sup>85</sup>

In response to the increased hostility towards immigrants, Congress nevertheless passed the quota system, which radically restricted immigration by imposing quotas based on the population composition of 1890 prior to the wave of immigrants from southern and eastern Europe.<sup>86</sup> Following the repeal of the national origins quota system, the majority of immigrants have come from Latin America and Asia.<sup>87</sup>

Similarly, during World War II, state laws prohibited the use of foreign languages due to anti-German and anti-Japanese sentiment in an effort to force assimilation of immigrants by requiring

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<sup>83</sup> Immigration Act of 1924, ch. 190, 43 Stat. 153, 155, 159; see also EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 470-74 (1981) (explaining the quota system and the delay in the effective date of the system).

<sup>84</sup> HUTCHINSON, *supra* note 83, at 470-74; see also Juan F. Perea, *Ethnicity And Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 811 (1994).

<sup>85</sup> President Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, Pub. Papers 441, 443 (June 25, 1952), *quoted in* Perea, *supra* note 84, at 815.

<sup>86</sup> Karst, *supra* note 8, at 311; cf. HIGHAM, *supra* note 27, at 300-01 (discussing the politics behind the immigration quotas).

<sup>87</sup> Immigration and Nationality Act of 1965, 79 Stat. 911 (1965) (current revision at 8 U.S.C. § 1101-1525 (1988)); see also Henry Fairlie, *Why I Love America*, NEW REPUBLIC, July 4, 1983, at 12, 17 (quoting Sen. Daniel Patrick Moynihan):

In fiscal year 1973, the top ten visa-issuing ports were Manila, Monterrey, Seoul, Tijuana, Santo Domingo, Mexico City, Naples, Guadalajara, Toronto, and Kingston. I would expect Bombay to make this top ten list before long . . . . In short, by the end of the century, the United States will be a multi-ethnic nation the like of which even we have never imagined.

the acquisition of English.<sup>88</sup> Suspicion of foreigners also resulted in the forced internment of Japanese-Americans during the Second World War.<sup>89</sup>

This tradition of pervasive discrimination has resulted in lower wages, less prestigious jobs, and limited employment opportunities for members of ethnic and language minority groups.<sup>90</sup> In particular, Hispanic individuals continue to find limited opportunities in prestigious and high-paying positions.<sup>91</sup>

<sup>88</sup> Heath, *supra* note 34, at 275.

<sup>89</sup> For an analysis of the internment process, see TENBROEK, *supra* note 26; FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS* (1976) (discussing the legal history of Japanese-Americans in the United States).

<sup>90</sup> See Greenfield & Kates, *supra* note 71, at 718 (“[T]he pattern of employment of the Mexican American, dictated through the discrimination encountered, has been the major factor contributing to the isolation of the Mexican American from the majority population.”) (footnote omitted); MICHAEL A. BARRERA, *RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* 62-99 (1979) (discussing the employment history of Chicano and Mexican immigrants); JOAN W. MOORE, *MEXICAN AMERICANS* 61 (1st ed. 1970) (“In nearly all of the broad occupational classifications . . . Mexicans held poorer jobs paying less money than did native American whites.”). Professor Moore states:

It is perfectly obvious from the most superficial examination of the data that in general Mexican Americans hold the less desirable jobs in the Southwest because of lack of education, lack of business capital, cultural dissimilarity to the majority, and their obvious role as a low-prestige group. Further, Mexicans are disproportionately forced to work in low-wage or marginal firms - in the less profitable, non-unionized fringes of the high-wage industries. Low job earnings are also associated with the concentration of Mexicans in certain low-wage geographical areas, the lower Rio Grande valley of Texas being an example. (Of course, such areas are “low-wage” partly *because* they are heavily Mexican).

*Id.* at 63; Verdugo & Verdugo, *Earnings Differentials Between Mexican American, Black, and White Male Workers*, in *THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY* 133, 136 (1985):

[W]hites fared better than either blacks or Mexican Americans socioeconomically. Whites earned more, had completed more years of schooling, and worked at far better jobs than either Blacks or Mexican Americans. Whites also appeared to be more fully employed as they worked more hours than either Blacks or Mexican Americans.

<sup>91</sup> See Linda E. Dávila, *The Underrepresentation of Hispanic Attorneys in Corporate Law Firms*, 39 *STAN. L. REV.* 1403, 1404 (1987) (footnotes omitted):

Despite many advances, minority representation in the legal profession, as in most prestigious fields, is still not proportionate to the minority presence in the general population. But even within the legal world, corporate law firms have been slower than other professional groups in moving toward a more proportionate racial balance . . . . One survey reported that Hispanics represent less than 1 percent of the attorneys in the 151 biggest law firms in the United States.



### B. Recent Efforts to Declare English the Official Language

Many people continue to view the expanded multicultural and ethnically diverse population as a threat to "United States culture and to the English language."<sup>92</sup> The official English movement and the accompanying increase in workplace language restrictions reflect a backlash against the growing number of immigrants, both legal and illegal.<sup>93</sup> Arguing that our national unity depends on the English language, proponents of English-only laws seek to protect the language by constitutional amendment or legislation.<sup>94</sup> Supporters of the English Language Amendment argue that the supremacy of the English language is being threatened and that our nation will dissolve into a "fractionalized, multilingual society."<sup>95</sup> In support, they contend that

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<sup>92</sup> Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 389-90 (1989) (internal quotation omitted); see also Karst, *supra* note 8, at 311 ("Those who react to cultural differences with fear or anger generally espouse nativist policies designed to repress the differences by excluding the 'others' from the country, by forcing them to conform to the norms of the dominant culture, or by relegating them to a subordinate status in society.").

<sup>93</sup> Califa, *supra* note 4, at 294, 297-99; *Official English*, *supra* note 45, at 1349; Lexion, *supra* note 42, at 661; Mealey, *supra* note 92, at 389 n.15; Margaret Carlson, *Only English Spoken Here: Language as Politics Spawns a Backlash Against Immigrants*, TIME, Dec. 5, 1988, at 29 (discussing accusations that race and xenophobia are the true motivating factors for English-only ballot initiatives).

<sup>94</sup> See *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 11 (1984) (statement of Sen. Denton), 15 (statement of Sen. Huddleston), 53 (statement of Hon. S.I. Hayakawa, former Senator). *Contra* William G. Milan, *Comment: Undressing the English Language Amendment*, 60 INT'L J. SOC. LANGUAGE 93, 95 (1986) ("[T]he greatest myth of all is that there is a necessary connection between speaking English and being an American. Equating American nationalism with the 'melting pot' is nothing more than a confusion of the concepts of *unity* and *uniformity*."); Liebowicz, *supra* note 55, at 530 (arguing that declaring English the official language of the United States "mak[es] precisely the mistake of equating the obviousness of language usage with its importance to national unity").

<sup>95</sup> Arington, *supra* note 64, at 327; see also *The English Language Amendment: Hearings on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 11 (1984) (statement of Sen. Denton); S.J. Res. 13, 100th Cong., 1st Sess., 133 CONG. REC. S7615 (daily ed. June 4, 1987) (statement of Sen. Symms). Consider the following statement by columnist George Will:

[Teddy Roosevelt] embodied the vigor of the nation during the flood tide of immigration. He said: "We have room for but one language here and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house." American life, with its atomizing emphasis on individualism, increasingly resembles life in a centrifuge. Bilingualism is a

bilingual programs maintain other languages and cultures to the detriment of immigrants learning English.<sup>96</sup> Moreover, English-only laws would ensure that all citizens become proficient in English in order to fully participate in the political process and advance socio-economically.<sup>97</sup>

The leading group supporting the English-Only movement is U.S.ENGLISH, whose founding members include former U.S. Senator S.I. Hayakawa and Dr. John Tanton.<sup>98</sup> U.S.ENGLISH lobbies for state and federal constitutional amendments declaring English the official language.<sup>99</sup> The group's supporters seek to restrict government funding for bilingual education by limiting it to short-term transitional programs, and they seek to abolish multilingual ballots.<sup>100</sup> They argue that bilingual education and

gratuitous intensification of disintegrative forces. It imprisons immigrants in their origins and encourages what Jacques Barzun, a supporter of the constitutional amendment, calls "cultural solipsism."

George Will, *In Defense of the Mother Tongue*, NEWSWEEK, July 8, 1985, at 78. As an example of the response to the fear that "Americans" will feel like outsiders in their own country, a city ordinance was enacted in Monterey Park, California requiring businesses to include the roman alphabet in signs because of the increasing number of Asian restaurants and shops. Mike Ward, *Language Problem Arises in City*, L.A. TIMES, Nov. 23, 1985, at 5, col. 2 (Orange Cty. ed.).

<sup>96</sup> Barnaby Zall & Martha Jimenez, *Official Use of English: Do We Need a Constitutional Amendment?*, A.B.A. J., Dec. 1, 1988, at 34 (Opponents of bilingual programs do not demand the abandonment of native languages and traditions; instead, they argue that private individuals and organizations rather than government should promote them). *Id.*

<sup>97</sup> S.J. Res. 13, 100th Cong., 1st Sess., 133 CONG. REC. S7615 (daily ed. June 4, 1987) (statement of Sen. Symms); Arington, *supra* note 64, at 327.

<sup>98</sup> Tim W. Ferguson, *The Bilingual Battle*, WALL ST. J., Apr. 29, 1988, at 22. Support for the group's efforts is evidenced by its 350,000 members in 1988 and annual budget of seven million dollars. JAMES CRAWFORD, *BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY AND PRACTICE* 54 (1989). Its membership grew to 400,000 in 1990. Schmid, *supra* note 68, at 65 n.1.

<sup>99</sup> Guy Wright, *U.S. English*, S.F. SUNDAY EXAMINER & CHRON., Mar. 20, 1983, at B9. *But see* Braj B. Kachru, *American English and Other Englishes*, in *LANGUAGE IN THE USA* 21 (1981) (declaring that English is the only language that can claim to be universal).

<sup>100</sup> See *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 60-61 (1984) (statement of S.I. Hayakawa, Co-Founder, U.S.ENGLISH) (arguing that multilingual elections threaten America and bilingual education is merely an effort to secure employment for Hispanic teachers); Gerda Bikales, *Testimony on F.Y. 1984 Appropriations for Bilingual Education*, at 2 (May 24, 1983) ("Bilingual education retards the acquisition of English language skills, and the integration of the students into the American mainstream . . . . When the children continue to be taught in the language of origin, we give them and their parents very ambiguous signals, which may well lead them to conclude that English is perhaps not essential at all."); *Official English*, *supra* note 45, at 1345.

ballots impede English acquisition and threaten national unity.<sup>101</sup> In addition, they assert that the demands for bilingual services and education are a novel request in the nation's history.<sup>102</sup> U.S. ENGLISH argues that the proposed amendments will prohibit efforts that diminish the supremacy of English by requiring state and federal government efforts to preserve and enhance the use of English, such as setting money aside to fund English classes.<sup>103</sup> Supporters of such efforts contend that the amendments are necessary to promote communication and immigrant assimilation into American society because recent immigrants are not learning English.<sup>104</sup> The organization asserts Hispanic leaders, as well as other ethnic minorities, resist learning English, "reject the melting-pot" concept, resist assimilation as a betrayal of their ancestral culture, and demand government funding to maintain their ethnic institutions.<sup>105</sup> Supporters of English-only rules argue that a person's culture should be maintained in the home

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<sup>101</sup> Califa, *supra* note 4, at 317-18.

<sup>102</sup> See *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 16 (1984) (statement of Sen. Huddleston) (quoting THEODORE H. WHITE, *AMERICA IN SEARCH OF ITSELF* (1982)):

Some Hispanics have, however, made a demand never voiced by immigrants before: that the United States, in effect, officially recognize itself as a bicultural, bilingual nation . . . . [They] demand that the United States become a bilingual country, with all children entitled to be taught in the language of their heritage, at public expense.

*But see* Perea, *supra* note 34, at 327 ("Whatever the merits of the extensive current debates about bilingual education, it has existed as a legitimate, state-supported form of education since our nation's beginning.").

<sup>103</sup> Gail D. Cox, 'English Only': *A Legal Polyglot*, NAT'L L.J., Oct. 26, 1987, at 9.

<sup>104</sup> *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 8-9 (1984) (statement of Sen. Denton) ("English is not recognized or treated by the U.S. government as the country's official language. As a result, the newest immigrants to the United States, unlike their predecessors, are not learning English."); English First, *Immigration Bill: Burdens the Nation; Fuels Bilingual Crisis*, Members' Report, Dec. 1986, at 1-2 ("These children will remain part of that population which never learns English . . . ."); Jeffrey Schmalz, *Hispanic Influx Spurs 3 Ballots on Language*, N.Y. TIMES, Oct. 26, 1988, at A1.

<sup>105</sup> Guy Wright, *U.S. English*, S.F. SUNDAY EXAMINER & CHRON., Mar. 20, 1983, at B9; Gerda Bikales & Gary Imhoff, *A Kind of Discordant Harmony* 10 (U.S. ENGLISH 1985) ("[A] vocal Hispanic leadership . . . gives lip service to the need of Hispanics to learn English while excoriating any practical English-language instruction that does not also reinforce the native language . . . . [T]he definition of the inability to speak English as *prima facie* evidence of membership in a disadvantaged and discriminated-against group entitled to affirmative action benefits, has rewarded limited English-language ability . . . .").

rather than in public.<sup>106</sup> The organization's current literature, although written in more general terms, evidences the same goals: to "reform bilingual education through funding flexibility and accountability for effective programs"; 'to promote opportunities for adults to learn English'; and 'to uphold language and civic requirements for naturalization.'<sup>107</sup>

Several states have adopted state constitutional amendments declaring English the official state language.<sup>108</sup> Many of these official English language provisions are merely symbolic and have limited significance, as evidenced by their inclusion in code sections designating the official state tree, flag, bird, flower, mammal, fish, shell, insect, and beverage.<sup>109</sup> California's amendment, however, declares English the official language of the state and gives power to the legislature to enforce the amendment by appropriate legislation.<sup>110</sup> In addition, the amendment directs legislative and state officials to ensure that the role of English is preserved and enhanced, and prohibits actions by the legislature which diminish or ignore the role of English as the state's common language.<sup>111</sup> In contrast, other states, including Louisiana, Oklahoma, and Wyoming, have defeated official-English efforts.<sup>112</sup> Similarly, Oregon's legislature denounced official-English legislation as "impair[ing] our pluralistic ideals."<sup>113</sup>

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<sup>106</sup> David Beers, 'Us' and 'Them': Push to Make English 'Official' Goes Beyond the Issue of Language, L.A. DAILY J., July 25, 1986, at 4.

<sup>107</sup> U.S. ENGLISH FACTS (U.S. ENGLISH, Washington, D.C.), July 1990, quoted in Perea, *supra* note 34, at 343.

<sup>108</sup> In 1986, legislators in twelve states introduced official-English bills: Alabama, Florida, Idaho, Iowa, Kansas, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Pennsylvania, and Wisconsin. *Official English*, *supra* note 45, at 1346 n.10 (citation omitted). In 1986, California passed its official-English amendment. Cox, *supra* note 103, at 10. Arizona, Colorado, and Florida have adopted state constitutional amendments declaring English the official state language. Perea, *supra* note 34, at 342 n.407 and accompanying text. Illinois declared "American" its official state language in 1923. *Official English*, *supra* note 45, at 1346 n.7. Arkansas, Georgia, Hawaii, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia have also declared English the state's official language. PIATT, *supra* note 22, at 22.

<sup>109</sup> See, e.g., ARK. CODE ANN. § 1-4-117 (Supp. 1989); ILL. ANN. STAT. ch. 1, paras. 2901-20 (Smith-Hurd 1991) (amending a 1923 law declaring "American" the official state language); IND. CODE ANN. § 1-2-10-1 (Burns 1993); KY. REV. STAT. ANN. § 2.013 (Michie/Bobbs-Merrill) (1992); MISS. CODE ANN. § 3-3-31 (1991); N.D. CENT. CODE § 54-02-13 (1989).

<sup>110</sup> CAL. CONST. art. III, § 6 (1986).

<sup>111</sup> *Id.*

<sup>112</sup> Cox, *supra* note 103, at 10.

<sup>113</sup> S.J. Res. 16, 65th Or. Leg. Ass. (1989).

Resolutions for an English Language Amendment have been regularly introduced in Congress since 1981.<sup>114</sup> In 1989 alone, four resolutions were introduced in Congress proposing to amend the Constitution to establish English as the official language of the United States.<sup>115</sup> The most restrictive proposed bill provides as follows:

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

SECTION 2. Neither the United States nor any State shall require, by law, ordinance, regulation, order, decree, program, or policy, the use in the United States of any language other than English.

SECTION 3. This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy—

(1) to provide educational instruction in a language other than English for the purpose of making students who use a language other than English proficient in English;

(2) to teach a foreign language to students who are already proficient in English;

(3) to protect public health and safety; or

(4) to allow translators for litigants, defendants, or witnesses in court cases.

SECTION 4. The Congress and the States may enforce this article by appropriate legislation.<sup>116</sup>

An earlier prepared English Language Amendment did not provide exceptions in Section 3.<sup>117</sup> Note that the bill does not provide an exception for the use of multilingual ballots or other assistance to voters as provided for in the Voting Rights Act.<sup>118</sup>

Some municipalities have also enacted English-only laws. In

<sup>114</sup> See, e.g., H.R.J. Res. 109, 104th Cong., 1st Sess. (1995); H.R.J. Res. 171, 103rd Cong., 1st Sess. (1993); H.R.C. Res. 13, 103d Cong., 1st Sess. (1993); H.R.J. Res. 81, 102nd Cong., 1st Sess. (1991); H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. 902 (1985); S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. 737 (1985); H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. 3618 (1983); S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S25049 (1983); S.J. Res. 72, 97th Cong. 1st Sess., 127 CONG. REC. S7400 (1981).

<sup>115</sup> H.R.J. Res. 23, 101st Cong., 1st Sess., 135 CONG. REC. 106 (1989); H.R.J. Res. 48, 101st Cong., 1st Sess., 135 CONG. REC. 209 (1989); H.R.J. Res. 79, 101st Cong., 1st Sess., 135 CONG. REC. 268 (1989); H.R.J. Res. 81, 101st Cong., 1st Sess., 135 CONG. REC. 268 (1989).

<sup>116</sup> H.R.J. Res. 656, 100th Cong., 2d Sess., 134 CONG. REC. 24108 (1988).

<sup>117</sup> See S.J. Res. 13, 100th Cong., 1st Sess., 133 CONG. REC. 348 (1987).

<sup>118</sup> 42 U.S.C. § 1973b(f)(1) (1984); see also Califa, *supra* note 4, at 303-11, 330 (analyzing the impact the English Language Amendment would have on language policy in the areas of education, voting, and employment discrimination, and concluding that "[t]he effects of the legislation are negative—deprivation of voting and education rights, increased hostility among groups, and a weaker nation").

1980, Dade County Florida passed an ordinance (which was amended and weakened in 1984).<sup>119</sup> Other municipalities which have passed English-only ordinances include Los Altos, Fillmore, and Monterey Park, California, and Lowell, Massachusetts.<sup>120</sup>

### C. *Opposition to the Official English Movement*

Despite the contrary claims by official English proponents, cultural diversity and multilingualism do not pose a threat to the survival of the United States.<sup>121</sup> The principle goal of the official English movement, however, is not to preserve the English language or save the integrity of the United States. As described by one commentator:

This proposal . . . is little more than a nativist symbol. It is not needed for the conduct of the public's business. . . . Nor does the proposal advance the cohesion of a multicultural nation. . . . The proposed amendment is an insult to the twenty million people in this country who speak a mother tongue that is not English, and a gratuitous insult at that.<sup>122</sup>

Many Hispanic leaders view the official English movement as a separatist effort directed primarily at Hispanics and motivated by prejudice and fear.<sup>123</sup> The history of the official English movement also demonstrates that it is founded on nativist fears and prejudices.<sup>124</sup> Furthermore, the proposed amendments fail to achieve the stated goals of promoting English acquisition and national unity.<sup>125</sup>

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<sup>119</sup> See Marshall Ingwerson, *In Miami, Sharp Tongues Battle over Bilingualism*, CHRISTIAN SCIENCE MONITOR, Aug. 17, 1987, at 3, col. 4.

<sup>120</sup> Cox, *supra* note 103, at 9; Mitchell Zuckoff, *Lowell Voters Endorse English as City's 'Official Language'*, BOSTON GLOBE, Nov. 8, 1989, at 31.

<sup>121</sup> Karst, *supra* note 8, at 362; CONKLIN & LOURIE, *supra* note 30, at 157; see also *It's UnAmerican*, ECONOMIST, Oct. 22, 1988, at 35 ("It is hard to argue that linguistic separatism is really a threat to America, which is at once one of the most ethnically heterogeneous and linguistically homogeneous nations in the world.").

<sup>122</sup> Karst, *supra* note 8, at 351 (footnotes omitted).

<sup>123</sup> *The English Language Amendment: Hearing of S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 163 (1984) (statement of Arnolando S. Torres, National Executive Director, League of United Latin American Citizens) ("It is our belief that [the official English amendment] is a backhanded attempt to further ostracize Hispanics and other language minorities from fully participating in society in the same way that Jim Crow laws ostracized Blacks. It is this separatist movement by these 'Americans' that must be stopped.").

<sup>124</sup> See discussion of Dr. Tanton *infra* note 220 and accompanying text.

<sup>125</sup> In opposition to the proposed English language amendment, Senator Pete Domenici (R. N.M.) stated:

Opponents of the official English movement declare that "primacy of English is nowhere threatened."<sup>126</sup> The Mexican American Legal Defense and Educational Fund, the National Council of La Raza, and Chinese for Affirmative Action contend that restrictions on the use of native languages inhibit rather than encourage the learning of English, and that groups such as U.S. ENGLISH create divisiveness by encouraging racism and bigotry.<sup>127</sup> Addressing the forces behind the drive for English monolingualism, two authors wrote:

Since early in the European colonization of North America, the English language has been the dominant speech of those in political and economic power. English monolingualism has been encouraged by rewards of social approval and advancement, promises of better jobs and higher wages, and awarding U.S. citizenship. It has been enforced by ridicule, denial of access to employment and education, confiscation of "foreign" language presses and publications, and beatings of schoolchildren for the use of other languages. Multilingualism has been mistakenly perceived as a dangerous threat to national unity.<sup>128</sup>

Thus, opponents argue that a primary goal of U.S. ENGLISH is to limit the political power of language minorities by denying them benefits and rights.<sup>129</sup>

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[T]his amendment won't remedy any of the problems . . . pointed out. It won't help anyone learn the English language. It won't improve our society. It won't lead to a more cohesive nation. In fact, it will create a more divided nation. This amendment is an insult to all Americans for whom English is not the first language . . . I oppose this amendment because it does nothing that it is supposed to do . . . It won't create a better, stronger, more cohesive American society.

131 CONG. REC. S11456 (daily ed. Sept. 13, 1985).

<sup>126</sup> Marshall Ingwerson, *Push for Official English on Ballot in 3 States*, CHRISTIAN SCIENCE MONITOR, Oct. 27, 1988, at 5; Braj B. Kachru, *American English and Other Englishes*, in LANGUAGE IN THE USA 21 (Charles A. Ferguson & Shirley Brice Heath eds., 1981) (identifying English as the only universal language).

<sup>127</sup> Gail D. Cox, *Citizen Movement Seeks to Proclaim English 'Official': A Matter of Symbols*, L.A. DAILY J., Apr. 25, 1986, at 1, col. 2; Beers, *supra* note 106, at 4, col. 3; S.J. Res. 20, 99th Cong., 2nd Sess., 132 CONG. REC. E2046 (daily ed. June 11, 1986) (statement of Arnoldo Torres, former director of the League of United Latin American Citizens); Eloise Salholz & Daniel L. Gonzalez et al., *Say it in English*, NEWSWEEK, Feb. 20, 1989, at 23 ("English-only [laws] 'send[ ] a message that [non-English speakers] cannot be trusted to become American like their ancestors did, and their assimilation must be imposed by statute.'") (quoting Geoffrey Nunberg, Professor of Linguistics, Stanford University).

<sup>128</sup> CONKLIN & LOURIE, *supra* note 30, at 157.

<sup>129</sup> Califa, *supra* note 4, at 317, 328-29; *see also* Arington, *supra* note 64, at 342-51 (arguing that English-only laws should be narrowly interpreted because of concerns

Proponents of the pro-English provisions view assimilation into American society as Anglocization; however, many recent immigrants refuse to accept Anglo culture as their primary culture.<sup>130</sup> The American ideal of unity, *E Pluribus Unum*, does not require the abrogation of native cultures for the sake of sameness.<sup>131</sup> In fact, the original design for a Great Seal celebrated this diversity by "propos[ing] that the seal should be engraved on the obverse with a shield divided into six quarterings, symbolizing the six major lands of origin of the American people - England, Scotland, Ireland, France, Germany, Holland . . . . The motto was to be: E Pluribus Unum."<sup>132</sup> But while the phrase "melting pot" has been used to describe the creation of a new American character and culture, historically the term has more accurately described efforts to require immigrants to conform to British-American culture and behavior.<sup>133</sup>

U.S. ENGLISH continues the tradition of discrimination and coercion by preying on the anxiety created by the number of immigrants and the lack of tolerance for differences.<sup>134</sup> Monol-

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regarding the process of direct legislation and the negative impact of this process on language minority rights).

<sup>130</sup> Cox, *supra* note 127, at 1. col. 2; Beers, *supra* note 106, at 4, col. 3. For a discussion of the costs associated with assimilation, see Irving Howe, *Toward An Open Culture*, NEW REPUBLIC, March 5, 1984, at 25, 27; ERNESTO GALARZA, *BARRIO BOY* (1971) (autobiography describing the acculturation of a Mexican immigrant to California); RICHARD RODRIQUEZ, *HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIQUEZ* (1982) (autobiography of a California-born Chicano leaving his family); *AMERICAN MOSAIC* (Joan Morrison & Charlotte F. Zablusky eds., 1980) (stories of the immigrant experience).

<sup>131</sup> See Perea, *supra* note 34, at 275 ("[T]he phrase . . . meant a *union* composed of *ethnically different peoples* . . . . The American union did not mean eliminating *pluribus* . . .").

<sup>132</sup> HORACE M. KALLEN, *CULTURAL PLURALISM AND THE AMERICAN IDEA* 69 (1956); see also RICHARD S. PATTERSON & RICHARDSON DOUGALL, *THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SEAL OF THE UNITED STATES* 6-31 (1976) (describing the efforts of a committee composed of Thomas Jefferson, John Adams, Benjamin Franklin, and the artist Du Simitiere).

<sup>133</sup> Karst, *supra* note 8, at 312; MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE* 84-114 (1964); Philip Gleason, *American Identity and Americanization*, in WILLIAM PETERSEN, *CONCEPTS OF ETHNICITY* 57, 80-96 (1982). More than 200 years old, the melting pot metaphor derives from a letter written by an American farmer in 1782: "Here individuals of all nations are melted into a new race of men . . ." J. HECTOR ST. JOHN DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 39 (1957). The metaphor gained popular acceptance in 1908 with the performance of Israel Zangwill's play, *The Melting Pot*: "America is God's Crucible, the great Melting-Pot where all the races of Europe are melting and re-forming!" ISRAEL ZANGWILL, *THE MELTING POT* 100 (1910).

<sup>134</sup> Beers, *supra* note 106, at 4, col. 5.



inguals often fear languages they do not understand and oppose the right to use languages other than their own.<sup>135</sup> As one commentator has stated, "distrust of the members of a different cultural group flows from fear, not just of the unknown but the fear that outsiders threaten our own acculturated views of the natural order of society."<sup>136</sup> In particular, Spanish is often viewed as a low-status language in the United States because of "the enduring sentiment variously held by a number [of] Americans that Spanish speakers are 'illiterate, impoverished, dirty, [and] backwards.'"<sup>137</sup> Rather than promoting national unity, examples from other countries demonstrate that declarations of an official language foster divisiveness and ethnic discord.<sup>138</sup> The cultural diversity from our rich mix of people should not be subjected to the threats and prejudices of the official English proponents; instead it should be celebrated for the benefit it provides our nation.

Since English is universally recognized as the predominant language in the United States, social and economic pressures require that all residents have a high level of proficiency in its use.<sup>139</sup> English acquisition is a necessity for success in education, employment, and virtually all aspects of daily life:

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<sup>135</sup> Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 894-95 (1986); Mealey, *supra* note 92, at 390.

<sup>136</sup> Karst, *supra* note 8, at 309; see EDWARD T. HALL, *THE SILENT LANGUAGE* 35 (1973); ROBERT H. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* 172, 174-75 (1975) (comprehension of the expected behavior of members of our own cultural group creates trust and acceptance); see also Fishman, *supra* note 8, at 133-34 ("anglo-oriented middle class Americans" fear the loss of their political and social power to immigrants whose primary language is not English).

<sup>137</sup> Roseann D. Gonzalez et al., *Language Rights and Mexican Americans: Much Ado About Nothing* (presented at Minority Language Rights and Minority Education: European and North American Perspectives, Cornell University, May 6-9, 1983), reprinted in *Hearings on H.J. Res. 13, H.J. Res. 33, H.J. Res. 60 & H.J. Res. 83, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 181, 185 (May 11, 1988); see also CONKLIN & LOURIE, *supra* note 30, at 159 ("[T]he prestige of a language derives from the social status of its speakers, not from the language itself.").

<sup>138</sup> Califa, *supra* note 4, at 322-23 (discussing the battle over languages in Canada, Sri Lanka, and Belgium); see also R.F. Inglehart & M. Woodward, *Language Conflicts and Political Community*, in *LANGUAGE AND SOCIAL CONTEXT* 358, 360 (Pier P. Giglioli ed., 1972) ("The likelihood that linguistic division will lead to political conflicts is particularly great when the language cleavages are linked with the presence of a dominant group which blocks the social mobility of members of a subordinate group, partly, at least, on the basis of language factors.").

<sup>139</sup> Piatt, *supra* note 135, at 898.

Cultural and societal forces in the United Kingdom and the United States, in particular, have pushed nonnative English speakers who have come to these countries as immigrants, refugees, or migrant workers to learn English so that they might move into the work force and achieve acceptance in the society beyond their own communities. In modern times, no official national-level policies mandate English; the status of English has been achieved in these countries without official declaration or the help of an official language academy. For speakers of other languages, the primary mandate for English has come from societal forces working on an individual's desire to secure education and employment, move into English-speaking social circles, and negotiate daily interactions with the bureaucratic and commercial mainstream.<sup>140</sup>

Despite the assertions of the proponents of official English provisions, most non-English-speaking immigrants learn English and speak it regularly.<sup>141</sup> In fact, Spanish-speaking immigrants are learning English as quickly as previous immigrant groups.<sup>142</sup> Studies demonstrate that native-born and immigrant Hispanics whose first language is Spanish learn English at an impressive rate. Hispanics follow the traditional three-generation model of language acquisition in which the first generation is primarily monolingual in Spanish; the second generation is bilingual; and by the third generation the preferred language is English.<sup>143</sup> The impression that Hispanic immigrants are not learning English is caused instead by the steady rate of Hispanic immigrants.<sup>144</sup>

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<sup>140</sup> Shirley Brice Heath, *Language Policies: Patterns of Retention and Maintenance*, in *MEXICAN-AMERICANS IN COMPARATIVE PERSPECTIVES* 259 (Walker Connor ed., 1985).

<sup>141</sup> Martha Jiminez, *Official Use of English: Do We Need a Constitutional Amendment?*, A.B.A. J., Dec. 1, 1988, at 35 (A 1988 study found that after fifteen years of residency, approximately 75% of Hispanic immigrants speak English on a daily basis, and seven out of ten children of Hispanic parents become English-speaking for all practical purposes. A 1985 Rand study found that 95% of first-generation Hispanics learn English, and all of their children are proficient in English).

<sup>142</sup> Ingwerson, *supra* note 126, at 5; see KEVIN F. MCCARTHY & R. BURCIAGA VALDEZ, *CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA* (1986).

<sup>143</sup> Jiminez, *supra* note 141, at 35; see CALVIN VELTMAN, *THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES* 44-45 (1988) (concluding that Hispanic immigrants quickly shift to English); *It's UnAmerican*, *supra* note 121, at 35 ("[T]here is little evidence that Spanish speakers cling to their language any more fervently than did previous groups of immigrants."); see also Fishman, *supra* note 8, at 129 (approximately 95 percent of Americans speak English).

<sup>144</sup> Jeffrey Schmalz, *Hispanic Influx Spurs 3 Ballots on Language*, N.Y. TIMES, Oct. 26, 1988, at B8; Leibowicz, *supra* note 55, at 529; VELTMAN, *supra* note 143, at 109 (asserting that Spanish monolingualism persists because of continued immigration rather than because of a failure to learn English).

The drive towards language restrictions also imposes grave penalties on the nation's economic future. Monolingualism disadvantages individuals competing in the global marketplace, and the United States urgently needs more English speakers who are fluent in other languages.<sup>145</sup> In contrast to the United States, the international population is comprised of predominantly bilingual or multilingual societies.<sup>146</sup> Despite our limited ability to communicate with people from other nations, the number of students studying foreign languages in the United States has dramatically declined in the last two decades.<sup>147</sup> Because of the paucity of talented bilingual Americans, the State Department was forced to eliminate the requirement that foreign-service candidates be fluent in a second language.<sup>148</sup> In 1989 the Governors' Task Force on International Education noted American students' lack of foreign language ability and advocated that foreign language instruction begin in the first grade.<sup>149</sup> America's failure to produce fluent bilinguals is a "crippling factor" in dealing with other nations in both international business and government matters.<sup>150</sup>

Congress has recognized and taken steps to remedy the pervasive discrimination faced by language minorities. For example, in 1975 Congress amended the Voting Rights Act to include language minorities by requiring state and political subdivisions to provide voting materials, instructions, and ballots "in the language of the applicable language minority group as well as in the English language."<sup>151</sup> Congress determined that "voting discrim-

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<sup>145</sup> Mealey, *supra* note 92, at 390 n.17; Vernon Walters, U.S. NEWS & WORLD REP., July 15, 1985, at 31 ("The failure to communicate with foreigners in their own language prevents them from understanding us as we really are. It makes it difficult for us to project our real purposes to other people.").

<sup>146</sup> CONKLIN & LOURIE, *supra* note 30, at 158.

<sup>147</sup> *Id.* at 231.

<sup>148</sup> George Gedda, *Americans' Lack of Foreign-language Skills Makes It Hard to Find Interpreters*, MINNEAPOLIS STAR TRIB., Jan. 8, 1989, at E4.

<sup>149</sup> Donald M. Rothberg, *Governors Urged to Push International Education*, ST. PAUL PIONEER PRESS DISPATCH, Feb. 26, 1989, at A5. *But see* FRANSOIS GROSJEAN, *LIFE WITH TWO LANGUAGES* 66 (1982) ("[B]ilingualism is treated as a stigma and a liability in the United States, whereas in many European and African countries it is considered a great asset.").

<sup>150</sup> Piatt, *supra* note 135, at 900.

<sup>151</sup> Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. § 1973b(f)(4) (1982)). Materials must be provided when more than 5% of voting-age citizens are members of a single language minority and illiteracy is higher than the national rate. 42 U.S.C. § 1973aa-la(b) (1994).

ination against citizens of language minorities [was] pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English."<sup>152</sup> Congress found that "[p]ersons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation [of discriminatory practices] concerning Asian Americans . . . [is] substantial."<sup>153</sup> But Congress limited the definition of language minorities to persons of American Indian, Asian American, Alaskan Native, or Spanish heritage.<sup>154</sup> Thus, protection extends only to language minorities who are also racial and ethnic minorities.<sup>155</sup>

Congress also enacted the Bilingual Education Act to help fund bilingual projects designed to aid people with limited English abilities whose primary language is not English.<sup>156</sup> Congress noted that "there are large and growing numbers of children of limited English proficiency[,] . . . many of [whom] . . . have a cultural heritage which differs from that of English proficient persons."<sup>157</sup> Similarly, "many adults are not able to participate fully in national life, and . . . limited English proficient parents are often not able to participate effectively in their children's education."<sup>158</sup> The difficulty in fully participating in all aspects of society was also recognized in the Department of Education regulations implementing the Act.<sup>159</sup>

<sup>152</sup> 42 U.S.C. § 1973b(f)(1).

<sup>153</sup> S. REP. NO. 295, 94th Cong., 1st Sess. 31 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 797.

<sup>154</sup> 42 U.S.C. § 1973aa-1a(e) (1982).

<sup>155</sup> Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1422 n.21 (1988).

<sup>156</sup> 20 U.S.C. §§ 3281-3341 (1988); *see also* Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1272-1314 (1988) (discussing subsequent amendments and reauthorizations of the Bilingual Education Act).

<sup>157</sup> 20 U.S.C. § 3282(a)(1)-(2) (1988).

<sup>158</sup> *Id.* § 3282(a)(19); *see also* H.R. REP. NO. 748, 98th Cong., 2d Sess. 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4036, 4042.

<sup>159</sup> 34 C.F.R. § 500.4(b)(1)(i)-(ii) (1988); *see also* Perea, *supra* note 75, at 286-87; Karst, *supra* note 8, at 354; H.R. REP. NO. 748, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S.C.C.A.N. 4036, 4039 ("The purpose of a bilingual program is to help children enter an all-English class as soon as possible."); Josue M. Gonzalez, *Coming of Age in Bilingual/Bicultural Education: A Historical Perspective*, 19 INEQUALITY IN EDUC. 5 (1975) (summarizing various types of bilingual education); Iris C. Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education*, 52 HARV. EDUC. REV. 149 (1982) (discussing the history of bilingual education and the related literature); Ricardo Otheguy, *Thinking About Bilingual Education: A Critical Appraisal*, 52 HARV. EDUC. REV. 301 (1982).

Members of language minority groups are also protected under the Equal Educational Opportunities Act of 1974, which prohibits states from denying equal educational opportunity to individuals on the basis of race, color, sex, or national origin.<sup>160</sup> This Act codified the Supreme Court's decision in *Lau v. Nichols* which held that the San Francisco school system discriminated against non-English speaking Chinese students on the basis of national origin in violation of Title VI by failing to provide special language instruction.<sup>161</sup> The Act also required states to provide special assistance to language minority students by "tak[ing] appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>162</sup> Finally, the Court Interpreters Act requires federal courts to provide interpreters for parties whose primary language is not English.<sup>163</sup>

## II

### NATIONAL ORIGIN DISCRIMINATION FRAMEWORK

#### A. *Title VII*

Title VII of the Civil Rights Act of 1964 provides the main source of protection against employment discrimination for language minorities.<sup>164</sup> Congress enacted Title VII in order to pro-

<sup>160</sup> 20 U.S.C. § 1703(f) (1974).

<sup>161</sup> *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>162</sup> 20 U.S.C. § 1703(f). The Equal Educational Opportunities Act further provides in relevant part:

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

*Id.*

<sup>163</sup> 28 U.S.C. § 1827 (1988).

<sup>164</sup> Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) states in part:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) 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, because of such individual's race, color, religion, sex, or national origin.

mote equal employment opportunities and conditions by prohibiting consideration of improper qualifications and removing barriers that favored white males.<sup>165</sup> Yet Congress failed to define the term “national origin” when it enacted Title VII. Although Title VII inspired what has been referred to as the “longest debate” in Senate history,<sup>166</sup> the legislative history regarding the term “national origin” is limited.<sup>167</sup> During the congressional debates, Representative Roosevelt (D. Cal.) attempted to provide a definition by stating, “May I just make very clear that ‘national origin’ means national. It means the country from which you or your forebears come from. You may come from Poland, Czechoslovakia, England, France, or any other country.”<sup>168</sup> In the discussion of Congress’ understanding that national origin could in some instances be a bona fide occupational qualification, Representative Roosevelt noted:

[T]here was evidence brought out before the committee of certain instances where labor unions that deal with a particular language group had to have and had to be able to hire to work with people who were able to speak the particular language used by the people of a certain national origin. Therefore, it was felt in order not to restrict their activity that quite properly they should be allowed to do that.<sup>169</sup>

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42 U.S.C. § 2000e-2(a) (1988).

<sup>165</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (discussing the purpose of Title VII). In response to a question regarding interference with an employer’s right to hire based on qualifications, Senator Clark, the Senate Floor Manager, replied: “To discriminate is to make distinctions or differences in the treatment of employees, and [such distinctions] are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill.” 110 CONG. REC. 7218 (1964).

<sup>166</sup> See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

<sup>167</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973) (characterizing the legislative history as “quite meager”). For a discussion of the term “national origin” in executive and legislative action prior to the Civil Rights Act of 1964, see Perea, *supra* note 84, at 810-17.

<sup>168</sup> 110 CONG. REC. 2549 (1964), reprinted in UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *LEGISLATIVE HISTORY OF TITLES VII AND IX OF CIVIL RIGHTS ACT OF 1964*, at 3179-80 (1968); see also BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 305 (2d ed. 1983) (“Congress intended to include within the category ‘national origin’ members of all national groups and groups of persons of common ancestry, heritage, or background.”).

<sup>169</sup> 110 CONG. REC. 2550 (1964). Note that Rep. Roosevelt’s statement recognizes the connection between language and national origin. *But see* Perea, *supra* note 84, at 819 n.80 (warning about attributing too much significance to the comment because the focus of the legislation was racial discrimination).

Representative Dent (D. Pa.) added to the definition: "National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person."<sup>170</sup> Congress deleted "ancestry" from the final version of the Act because the word was considered synonymous with "national origin."<sup>171</sup>

The Equal Employment Opportunity Commission (EEOC) broadly defines national origin as the place of origin of one's ancestors.<sup>172</sup> Under the EEOC guidelines, national origin discrimination is defined as the denial of employment due to "an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."<sup>173</sup> The guidelines recognize an individual's primary language as an essential characteristic of his or her national origin.<sup>174</sup>

The EEOC was created as part of Title VII and given responsibility for administering the Act.<sup>175</sup> When originally established in 1964, the EEOC had authority to receive and investigate charges of discrimination and resolve them through conciliation, but it lacked significant enforcement power.<sup>176</sup> Congress amended Title VII in 1972 to grant the EEOC authority to bring civil suits for unlawful employment practices.<sup>177</sup> The EEO Act thus created a quasi-judicial agency with enforcement power to implement the policies underlying Title VII. The EEOC was also authorized to issue procedural guidelines.<sup>178</sup> Although the EEOC is not explicitly authorized to issue interpretive guide-

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<sup>170</sup> SCHLEI & GROSSMAN, *supra* note 168, at 305.

<sup>171</sup> *Espinoza*, 414 U.S. at 88-89.

<sup>172</sup> 29 C.F.R. § 1606.1 (1995).

<sup>173</sup> *Id.* This protection also extends to spouses and people associated with individuals who possess these characteristics. 29 C.F.R. § 1606.1(a)-(d) (1995) (protecting spouses, associates of members of national origin groups, members of organizations identified with national origin groups, persons who attend churches or schools used by a national origin group, and individuals who are associated with those having foreign-sounding surnames).

<sup>174</sup> 29 C.F.R. § 1606.7 (1995).

<sup>175</sup> 42 U.S.C. § 2000e-4 (1982).

<sup>176</sup> 42 U.S.C. § 2000e-4(f) (1970); see UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3258-72 (1968).

<sup>177</sup> 42 U.S.C. § 2000e-4(g)(6) (permitting EEOC "to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent").

<sup>178</sup> 42 U.S.C. § 2000e-12(a) (1982) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations . . .").

lines, the Supreme Court has recognized such authority.<sup>179</sup> In the 1970 Guidelines on Discrimination Because of National Origin, the EEOC provided examples of actions constituting national origin discrimination, including using tests in English when English is not the test taker's first language and denying employment because a person's name reflects a certain national origin.<sup>180</sup>

In the only Supreme Court decision directly defining the term "national origin," *Espinoza v. Farah Manufacturing Co.*, the Court stated that national origin refers to the place where one was born or the country from which one's ancestors came, but not the country of one's citizenship.<sup>181</sup> In *Espinoza*, the Court held that the company did not discriminate on the basis of Ms. Espinoza's national origin when it refused to hire her because of her Mexican citizenship.<sup>182</sup> The Court found that the original EEOC guidelines equating citizenship with national origin were inconsistent with congressional intent.<sup>183</sup> Because Congress did not eliminate the practice of requiring citizenship for federal employees, the Court reasoned that Congress could not have intended to equate citizenship with national origin.<sup>184</sup> In dissent, Justice Douglas agreed with the EEOC's position that "[r]efusing to hire an individual because he is an alien 'is discrimination based on birth outside the United States and is thus discrimina-

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<sup>179</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) ("The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); see also MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.02, at 200 (1988)).

<sup>180</sup> 29 C.F.R. § 1606.1(b) (1971) ("Title VII is intended to eliminate covert as well as the overt practices of discrimination . . . where persons . . . have been denied equal employment opportunity for reasons which are grounded in national origin considerations.").

<sup>181</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973). While the Court appeared to equate "ethnic discrimination" with "national origin discrimination" in other cases, the cases lack significant explanation of the terms. See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 328-29, 338 n.19 (1977) (in a lawsuit brought on behalf of Blacks and Spanish-surnamed individuals, the Court referred to "racial and ethnic discrimination"); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 398-99, 405 (1977) (in a suit by Mexican-American individuals alleging race or national origin discrimination, the Court referred to an allegation of "ethnic discrimination").

<sup>182</sup> *Espinoza*, 414 U.S. at 95-96.

<sup>183</sup> *Id.* at 89-91.

<sup>184</sup> *Id.*



tion based on national origin in violation of Title VII."<sup>185</sup> After this decision, the EEOC revised its guidelines, stating that discrimination on the basis of citizenship is not per se national origin discrimination.<sup>186</sup> Some lower federal courts have extended this definition of "national origin" to include an individual's ancestry despite the lack of a national affiliation.<sup>187</sup>

### *B. Section 1981 and National Origin Discrimination Claims*

Members of language minority groups may also seek protection from employment discrimination under the Civil Rights Act of 1870, which provides a remedy against employment discrimination on the basis of race.<sup>188</sup> In contrast to Title VII, which reaches only employers of fifteen individuals or more, section 1981 does not contain a statutory minimum.<sup>189</sup> While an employee may seek relief under both Title VII and section 1981 for racial discrimination by a private employer, section 1981 may be used by an employee of the federal government only in the limited cases when discrimination in federal employment is not covered by Title VII.<sup>190</sup> In addition, section 1981 requires proof of purposeful or intentional discrimination, which is established

<sup>185</sup> *Id.* at 97-98 (Douglas, J., dissenting) (quoting Brief for Commission as Amicus Curiae). See also Perea, *supra* note 84, at 824 ("The plain meaning of the statutory language . . . and its meager legislative history . . . easily could have been interpreted to prevent discrimination against a legal alien.").

<sup>186</sup> 29 C.F.R. § 1606.1(d) (1974).

<sup>187</sup> See, e.g., Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988) (holding that Serbians can claim national origin protection although Serbia did not exist as a nation at the time the lawsuit was filed); Janko v. Illinois State Toll Highway Auth., 704 F. Supp. 1531, 1532 (N.D. Ill. 1989) (holding that Gypsies can claim national origin protection); Roach v. Dresser Indus. Valve & Instrument Div., 494 F. Supp. 215, 218 (W.D. La. 1980) (holding that Acadians ["Cajuns"] can claim national origin protection). But see Perea, *supra* note 84, at 831, 860-62 (stating that a broad interpretation by the courts or the EEOC is not supported by the statutory language or legislative history; because of the current Supreme Court's strict construction of civil rights statutes, Professor Perea argues that Title VII should be amended to bar discrimination on the basis of ethnic traits).

<sup>188</sup> The Civil Rights Act of 1870 provides:

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

<sup>189</sup> SCHLEI & GROSSMAN, *supra* note 168, at 669 & n.11.

<sup>190</sup> See *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976) (holding that section 717 of Title VII provides "the exclusive judicial remedy" for federal employ-

under the same standards applied in the Title VII context.<sup>191</sup>

Prior to the Supreme Court's decision in *St. Francis College v. Al-Khazraji*,<sup>192</sup> the majority of courts held that ethnicity and national origin were not per se prohibited bases of discrimination under section 1981.<sup>193</sup> The Supreme Court held in *Al-Khazraji*, however, that section 1981 protects identifiable classes of persons who were subject to intentional discrimination based solely on their ancestry or ethnic characteristics.<sup>194</sup> Based on an examination of nineteenth century dictionaries and encyclopedias as well as the statute's legislative history, the Court determined that the term "race" referred not only to distinct ethnic groups such as Jews and Gypsies, but also included nationalities such as Swedes, Greeks, Hungarians, Italians, and Mexicans.<sup>195</sup> The Court agreed with the Third Circuit's determination that "§ 1981, 'at a minimum,' reache[d] discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.'"<sup>196</sup> Noting that a distinctive physiognomy was not essential for section 1981

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ees). The Eleventh Amendment provides sovereign immunity protection for state entities. SCHLEI & GROSSMAN, *supra* note 168, at 674 & n.16.

<sup>191</sup> General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386-88 (1982); see McDonald v. Santa Fe Trail Transp. Co. 427 U.S. 273 (1976); PLAYER, *supra* note 179, at 616.

<sup>192</sup> 481 U.S. 604 (1987).

<sup>193</sup> See, e.g., Shah v. Mt. Zion Hosp. & Medical Ctr., 642 F.2d 268, 272 (9th Cir. 1981) ("Section 1981 only prohibits racial discrimination" and does not apply to a Caucasian of East Indian descent.); Gutierrez v. Aero Mayflower Transit Co., 22 Fair Empl. Prac. Cas. (BNA) 447, 449 (N.D. Cal. 1979) (stating that recovery is not available for § 1981 discrimination based solely on national origin); Barbre v. Garland Indep. Sch. Dist., 474 F. Supp. 687, 700 (N.D. Tex. 1979) (stating that § 1981 only prohibits racial discrimination and does not include other categories); Foreman v. General Motors Corp., 473 F. Supp. 166, 177 (E.D. Mich. 1979) (stating in dictum that § 1981 does not cover claims of national origin discrimination); Gomez v. Pima County, 426 F. Supp. 816, 819 (D. Ariz. 1976) (stating that Mexican-Americans cannot sue under § 1981 if alleged discrimination based solely on national origin). *But see* Harris v. Norfolk & W. Ry., 616 F.2d 377, 378 (8th Cir. 1980) (stating in dictum that § 1981 covered national origin discrimination); Sud v. Import Motors Ltd., 379 F. Supp. 1064, 1072 (W.D. Mich. 1974) (stating that § 1981 covered national origin discrimination).

<sup>194</sup> 481 U.S. at 613. In the case, an associate professor, who was a U.S. citizen born in Iraq, was denied tenure. He then alleged violations of §§ 1981, 1983, 1985(3), 1986, Title VII and state laws. The district court granted summary judgment for the college on the § 1981 claim; the other claims were dismissed as untimely or for want of state action. 523 F. Supp. 386 (W.D. Pa. 1981). The Third Circuit reversed the dismissal of the § 1981 claim. 784 F.2d 505 (3rd Cir. 1986).

<sup>195</sup> *Al-Khazraji*, 481 U.S. at 610-13.

<sup>196</sup> *Id.* at 613.

protection, the Court concluded that “[i]f respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.”<sup>197</sup> In his concurring opinion, Justice Brennan noted that “the line between discrimination based on ‘ancestry or ethnic characteristics’ . . . and discrimination based on ‘place or nation of . . . origin’ . . . is not a bright one.”<sup>198</sup> While an individual’s ancestry (the ethnic group from which an individual or his ancestors are descended) is not necessarily identical with the individual’s national origin, the two are often identical as a factual matter.<sup>199</sup> Brennan also noted that the terms overlap in the Title VII context, citing as authority the EEOC definition of national origin discrimination.<sup>200</sup> He concluded by interpreting the Court’s opinion as stating only that “discrimination based on *birthplace alone* is insufficient to state a claim under § 1981.”<sup>201</sup> In subsequent cases, courts have also noted the lack of any substantive difference between national origin and ancestry and ethnicity, thus extending the reach of national origin protection under § 1981.<sup>202</sup>

### C. *The First Amendment and Official English Provisions*

Some recent amendments to state constitutions restricting the use of non-English languages have conflicted with the First Amendment rights of public employees. In a recent decision, the

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<sup>197</sup> *Id.* For a criticism of the Court’s distinction between national origin as place of birth and race as including ancestry and ethnicity, see Rachel R. Munafo, *National Origin Discrimination Revisited*, 34 CATH. LAW. 271, 275-76 (1991).

<sup>198</sup> *Al-Kharaji*, 481 U.S. at 614 (Brennan, J., concurring).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See, e.g., Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989) (“Although the parties describe the charge as one of racial discrimination, it is more accurately described as a charge of discrimination based on color, ethnicity, or national origin, rather than on race, since Indians are Caucasians. But the precise characterization makes no difference in this case.”); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988) (“In some cases, the distinction between a § 1981 claimant’s race and his national origin may prevent an adverse judgment . . . . In [this] case, however, this appears to be a difference without significance.”); *Nieto v. United Auto Workers Local 598*, 672 F. Supp. 987, 989 (E.D. Mich. 1987) (“[A] person of Mexican descent who was born in Poland could be discriminated against because he was born in Poland without violating 1981, but not because his ancestors were Mexican. As a practical matter . . . there is no longer a distinction for purposes of 1981 between race and national origin based discrimination.”).

Ninth Circuit Court of Appeals held that Article 28 of the Arizona Constitution, which declared English the official state language and provided that state and political subdivisions, including all government officials and employees performing government business, must "act" only in English, violated the First Amendment and constituted a prohibited means of promoting the English language.<sup>203</sup> The plaintiff, who was fluent in English and Spanish, was employed by the Arizona Department of Administration processing medical malpractice claims asserted against the state. Prior to the passage of the amendment, she communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants. Because state employees are subject to employment sanctions if they fail to obey the Arizona Constitution, Ms. Yniguez stopped using Spanish at work. She then filed an action seeking an injunction against state enforcement of the amendment and a declaration that the article violated the First and Fourteenth Amendments as well as federal civil rights laws.

First, noting that eighteen states had adopted "official-English" laws, the Ninth Circuit characterized Arizona's as "by far the most restrictively worded official-English law to date."<sup>204</sup> While the official-English laws in many other states are merely symbolic, the court determined that Arizona's provision "broadly

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<sup>203</sup> Yniguez v. Arizonans For Official English, 42 F.3d 1217, 1220-21 (9th Cir. 1994), *reh'g granted*, 53 F.3d 1084 (9th Cir. 1995). Article 28 provides in relevant part:

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

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

(3)(a) This Article applies to:

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

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

. . . .

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

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

Section 3.(a) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

ARIZ. CONST. art. 28, §§ 1-3.

<sup>204</sup> Yniguez, 42 F.3d at 1224 (quoting Arington, *supra* note 64, at 337).

prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section."<sup>205</sup> The court determined that the provision's broad language was facially invalid because it applies to speech in a myriad of settings, including "ministerial statements by civil servants . . . teachers speaking in the classroom, . . . town-hall discussions between constituents and their representatives [and] the translation of judicial proceedings in the courtroom . . . . [U]niversities would be barred from issuing diplomas in Latin, and judges performing weddings would be prohibited from saying 'Mazel Tov . . . .'"<sup>206</sup> The court rejected the defendants' contention that an individual's choice of language involved expressive conduct rather than pure speech concerns. While recognizing that a bilingual person makes an expressive choice when choosing a language, the court stated that language by definition is speech, and the choice of specific words and language affects both the message and the ability to make oneself understood.<sup>207</sup> Although the government has greater freedom in regulating the speech of its employees than the speech of private citizens, particularly when the regulation relates to the government's interest in efficient and effective performance of its functions, greater protection is provided to speech which the public desires to hear.<sup>208</sup> By prohibiting the exchange of public information in the most readily comprehensible language for some members of the public, the provision "obstructs the free flow of information and adversely affects the rights of many private persons by requiring the incomprehensible to replace the intelligible."<sup>209</sup> Thus, the restriction on public employee speech obstructs Arizona's interest in efficiency and effectiveness since the use of Spanish or other non-English languages positively contributes to the administra-

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<sup>205</sup> *Id.* at 1228. In making this determination, the court rejected the Arizona Attorney General's construction that the article applied only to "official acts" of state governmental entities, and that languages other than English could be used "when reasonable to facilitate the day-to-day operation of government." *Id.* at 1225 (quoting Op. Att'y. Gen. No. I89-009 (1989)).

<sup>206</sup> *Id.* at 1229.

<sup>207</sup> *Id.* at 1231.

<sup>208</sup> *Id.* at 1234-35. Citing long-standing Supreme Court precedent, the court declared that prohibitions on public employee speech "may not be justified by the simple assertion that the government is the employee's employer." *Id.* at 1234.

<sup>209</sup> *Id.* at 1237.

tion of the State. The court noted, however, that a public employee does not have an absolute right to speak in another language, so the state could restrict inappropriate language when it would hinder job performance.<sup>210</sup>

The court next rejected the argument that Article XXVIII promotes significant state interests in protecting democracy by “encouraging ‘unity and political stability’; encouraging a common language; and protecting public confidence.”<sup>211</sup> Although recognizing the importance of the first two interests, the court determined that the provision was an unfair, ineffective, and inappropriate means of promoting them, and that the substantial adverse effect on First Amendment rights outweighed the goals.<sup>212</sup> The court declared that “the state cannot achieve unity by prescribing orthodoxy,” noting with approval the plaintiff’s argument in *Meyer v. Nebraska* that “forced ‘Americanization’ violates the American tradition of liberty and toleration.”<sup>213</sup> In addition, the court found that the coercive proscription of non-English languages did nothing to promote English, and the measure inhibits rather than promotes public confidence in the effective and efficient administration of the state’s business.<sup>214</sup> In conclusion, the court noted that the adverse impact of the provision was especially egregious because it fell almost entirely upon Hispanics and other national origin minorities.<sup>215</sup> Emphasizing the prejudices and fears behind the official-English laws, the court stated that “[s]ince language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment.”<sup>216</sup> Because the diverse and multicultural character of our society exists as one of the nation’s greatest strengths, statutes should not attempt to

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<sup>210</sup> *Id.* at 1238.

<sup>211</sup> *Id.* at 1239.

<sup>212</sup> *Id.* at 1240-41. The court relied on the Supreme Court’s analysis in *Meyer v. Nebraska*, 262 U.S. 390 (1923) (discussed *supra* note 68) and *Farrington v. Tokushige*, 273 U.S. 284 (1927) (finding that the promotion of similar interests was insufficient to justify infringement on the right to educate one’s children in one’s mother tongue, and the repressive means adopted to encourage English acquisition were arbitrary and invalid).

<sup>213</sup> *Yniguez*, 42 F.2d at 1241 (citing *Meyer*, 262 U.S. at 392).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1241 (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486, *reh’g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S.Ct 2726 (1994) (an “English-only rule in the workplace may disproportionately affect Hispanic employees”)).

<sup>216</sup> *Id.* at 1241-42 (footnote omitted).

compel immigrants to give up their native languages, but should instead encourage and provide opportunities for the acquisition of English proficiency.<sup>217</sup>

#### D. *The Immigration Reform and Control Act*

In 1965, Congress repealed immigration laws which favored European over Asian and Hispanic immigrants.<sup>218</sup> The repeal of these laws, combined with the political turmoil in Latin America and Southeast Asia, resulted in a massive increase in the number of immigrants from these regions. This rapid rise in non-European immigrants increased the call for immigration restrictions by groups such as the Federation for American Immigration Reform (FAIR).<sup>219</sup> Evidencing the relationship between the official English movement and anti-immigrant policies is the founding of FAIR by one of the leaders of the official English movement and co-founder of U.S.ENGLISH, Dr. John Tanton.<sup>220</sup> The founder

<sup>217</sup> *Id.* at 1242. See also *Gutierrez v. Municipal Court of S.E. Judicial Dist.*, 838 F.2d 1031, 1044 n.19 *reh'g en banc denied*, 861 F.2d 1187 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), in which the Ninth Circuit recognized that serious constitutional questions would arise if an English-only rule forbade communication in Spanish with non-English speaking members of the public.

<sup>218</sup> Pub. L. No. 89-236, § 2, 79 Stat. 911 (1965) (amending 8 U.S.C. § 1152).

<sup>219</sup> DAVID H. BENNETT, *THE PARTY OF FEAR, FROM NATIVIST MOVEMENT TO THE NEW RIGHT IN AMERICAN HISTORY* 363-72 (1988).

<sup>220</sup> Califa, *supra* note 4, at 300. In an infamous paper, Dr. Tanton revealed the true motives of his efforts with U.S.ENGLISH and expressed his fears about Hispanic immigration:

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

...

Will Latin American migrants bring with them the tradition of the mordida (bribe), the lack of involvement in public affairs, etc.?

...

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

In the California of 2030, the non Hispanic Whites and Asians will own the property, have the good jobs and education, speak one language and be mostly Protestant and 'other.' The Blacks and Hispanics will have the poor jobs, will lack education, own little property, speak another language and will be mainly Catholic.

Memorandum from John Tanton to WITAN IV Attendees (Oct. 10, 1986), *quoted in* Califa, *supra* note 4, at 326-27 nn. 215-22.

of English First, Lawrence Pratt, also served as the secretary of the Council for Inter-American Security, which, in 1985, published a report identifying Hispanics who support bilingual education as a national security risk.<sup>221</sup>

Reflecting a shift in immigration policy, the Immigration Reform and Control Act of 1986 (IRCA) made it unlawful for employers to hire undocumented or unauthorized aliens.<sup>222</sup> IRCA has three major provisions: a legalization program to provide temporary permanent resident status and ultimately permanent resident status to undocumented individuals,<sup>223</sup> employer sanctions,<sup>224</sup> and anti-discrimination provisions.<sup>225</sup> Section 102 of IRCA prohibits discrimination in the hiring, recruitment or discharge of an employee on the basis of national origin or citizenship status, unless the employer employs three or fewer employees, the victim is covered by Title VII, or the discrimination is necessary to comply with federal, state, local, or other laws.<sup>226</sup> Aliens newly legalized under IRCA's amnesty provisions must demonstrate a "minimal understanding of ordinary English" in order to become permanent residents.<sup>227</sup> Similarly, naturalized citizenship status requires literacy in English, and admission requires a demonstration of literacy.<sup>228</sup>

While IRCA has failed to eliminate illegal immigration, the

<sup>221</sup> R.E. BUTLER, ON CREATING A HISPANIC AMERICA: A NATION WITHIN A NATION? 9-13 (1985); Califa, *supra* note 4, at 299-300.

<sup>222</sup> 8 U.S.C. §§ 1255a(a), 1324a (1988 & Supp. II 1990).

<sup>223</sup> 8 U.S.C. § 1255a(a)-(b) (1988 & Supp. V 1993).

<sup>224</sup> This provision makes it unlawful for a person or entity knowingly "(1)(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment," or "(2) . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(1)-(2) (1988 & Supp. V 1993). Employers must verify employment eligibility and identification with specific documents for every employee. 8 U.S.C. § 1324a(b).

<sup>225</sup> These provisions categorize unfair immigration related employment practices in order to protect citizens and authorized workers from discrimination based on citizenship, protected individual status, or national origin. 8 U.S.C. § 1324b(a)(1)(3) (1988 & Supp. V 1993); 8 U.S.C. § 1324b(a)(1) (1988 & Supp. II 1990). Employers with fewer than four employees are not subject to these anti-discrimination provisions. 8 U.S.C. § 1324b(a)(2)(A).

<sup>226</sup> 8 U.S.C. § 1324b(a)(2)(C). An aggrieved party must first file for relief under Title VII or section 1981 if covered by those provisions. 8 U.S.C. § 1324b(a)(2)(B). In addition, employers may discriminate on the basis of citizenship when the candidates are "equally qualified." 8 U.S.C. § 1324b(a)(4).

<sup>227</sup> 8 U.S.C. § 1255a(b)(1)(D)(i) (1988 & Supp. 1992).

<sup>228</sup> 8 U.S.C. § 1423 (1988); 8 U.S.C. § 1182(25) (1988).



Act has created new forms of discrimination as well as an increase in discrimination against ethnic minorities, particularly Hispanic and Asian.<sup>229</sup> The discriminatory practices have included refusing to hire applicants who appear to be "foreign" or have an accent, applying the verification requirements only to applicants who appear "foreign" or have an accent, and hiring only United States citizens or green card holders.<sup>230</sup> In testimony before a congressional subcommittee, advocates supporting the repeal of employer sanctions cited the following reports:

A U.S. General Accounting Office study in 1990 found that employer sanctions provisions caused 'a widespread pattern of discrimination' against Asians, Latinos and other minorities who are viewed as foreigners.

A 1992 NYC Human Rights commission report found that 52 percent of employers asking for work authorization before hiring use foreign accent or appearance as an excuse to enforce immigration laws discriminantly.

A 1989 survey of San Francisco businesses found that 50 percent of employers felt it was risking a fine or penalty under IRCA to hire someone who spoke limited English, although they had legal documents to work in the United States.<sup>231</sup>

In order to comply with the law, many employers have engaged in employment practices which adversely affect citizens and work-authorized immigrants who look or sound foreign by subjecting them to greater scrutiny.<sup>232</sup>

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<sup>229</sup> Espenoza, *supra* note 9, at 344, 368; UNITED STATES GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 6 (1990) (National origin discrimination resulting from IRCA amounts to more than just a "few isolated cases" and constitutes a "serious pattern of discrimination.").

<sup>230</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 229, at 41-43.

<sup>231</sup> Espenoza, *supra* note 9, at 348 n.42; *see also Employment Discrimination and Immigration Reform: Hearing on HR 1510 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor*, 98th Cong., 1st Sess. 41, 42 (1983) ("Although the proposed transitional employee verification system purports to reduce the probability of employment discrimination, in practical application, it could engender increased discrimination."). Senator Kennedy stated: "[T]here continues to be evidence that Hispanic and Asian Americans 'are being required by fearful employers to produce documents which are never required of other Americans—and if they fail to comply they are denied the jobs.'" *Id.* Companies also turn away "anyone who looks foreign" in order to avoid problems with the INS. *Immigration, Senate Immigration Panel Hears Views on Repealing Employer Sanctions, Daily Rep. For Executives* (BNA) No. 66, at A-11 (Apr. 6, 1992).

<sup>232</sup> CECILIA MUNOZ, NATIONAL COUNCIL OF LA RAZA, UNFINISHED BUSINESS: THE IMMIGRATION AND REFORM CONTROL ACT OF 1986, 38-41 (1990); Charles D. Smith & Juan E. Mendez, *Employer Sanctions and Other Labor Market Restrictions*

## III

EEOC AND JUDICIAL ANALYSIS OF WORKPLACE  
ENGLISH-ONLY RULES

While courts tend to adopt a more restrictive definition,<sup>233</sup> the EEOC broadly defines national origin discrimination as including “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”<sup>234</sup> The EEOC Guidelines create a presumption that rules requiring employees to speak English at all times in the workplace constitute national origin discrimination in violation of Title VII.<sup>235</sup> However, the EEOC Guidelines do permit an employer to impose limited language restrictions if justified by a business necessity.<sup>236</sup> If an employer institutes such a rule, the employer must notify the employees of the general circumstances when English is required and the consequences of violating the rule.<sup>237</sup>

In the first federal court decision to address the issue of workplace English-only rules, the court recognized the disparate impact such rules have on members of a language minority group.<sup>238</sup> Brothers Well Service operated “workover rigs” which

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*on Alien Employment: The “Scorched Earth” Approach to Immigration Control*, 6 N.C.J. INT’L L. & COM. REG. 19, 58 (1980).

<sup>233</sup> See, e.g., *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (discussed *infra* notes 243-249 and accompanying text).

<sup>234</sup> 29 C.F.R. § 1606.1 (1995).

<sup>235</sup> 29 C.F.R. § 1606.7(a) (1995) (footnote omitted). The text of this Guideline states:

*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. It may also create an atmosphere of inferiority, isolation and intimidation based on 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.

*Id.*

<sup>236</sup> 29 C.F.R. § 1606.7(b) (“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>237</sup> 29 C.F.R. § 1606.7(c).

<sup>238</sup> *Saucedo v. Brothers Well Service, Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979).

are placed over oil wells with declining production to reclaim the remaining oil. Fifty percent of the employees were Mexican-American. Mr. Saucedo, a bilingual Mexican-American, was informed that the shop supervisor did not permit any "Mexican talk." The shop supervisor discharged Mr. Saucedo for violating the English-only rule when Saucedo brought a part to a coworker in the shop and asked in Spanish where to place it. When the coworker challenged the discharge, the shop supervisor assaulted the coworker. Neither the coworker nor shop supervisor were reprimanded. The court held that Saucedo was discriminatorily discharged because of racial animus, and it awarded him back pay and attorney fees.<sup>239</sup> While the supervisor and coworker were not disciplined for fighting, Saucedo was dismissed for violating an unwritten rule that he was not aware was a company policy enforced by immediate discharge. Although the court did not decide the case on the basis of disparate impact analysis, the court stated the following with regard to English-only rules:

A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job. The question in a case of this nature therefore becomes whether or not the employer can prove by a preponderance of the evidence that his "rule" requiring only English to be spoken on the job is the result of business necessity.<sup>240</sup>

The court ruled that credible evidence did not show that the company had and enforced an English-only policy, and the company also failed to show that speaking two Spanish words created a danger or caused a failure of communication.<sup>241</sup> However, the court stated in dicta that "a duly and officially promulgated . . . rule absolutely prohibiting the speaking of a foreign language during the drilling of a well or the reworking of a well, and providing for immediate discharge for violation of the rule, would be a reasonable rule for which a business necessity could be demonstrated."<sup>242</sup>

In contrast, the Fifth Circuit has determined that an English-only policy does not violate Title VII on the basis of national

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<sup>239</sup> *Id.* at 920-23.

<sup>240</sup> *Id.* at 922.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 921.

origin discrimination.<sup>243</sup> Hector Garcia was a bilingual native-born American of Mexican descent employed as a salesman by Gloor Lumber & Supply, Inc. The owner instituted a rule prohibiting employees from speaking Spanish on the job unless conversing with a Spanish-speaking customer. The employees were permitted to speak Spanish during breaks and other free time. Employees who worked exclusively in the lumber yard away from the public were permitted to speak Spanish at all times. The rule was promulgated because of the owner's belief that customers objected to communications they could not comprehend, the rule would improve the employees' English, and it would permit improved supervision. Thirty-one of the thirty-nine employees and seven of the eight salespeople were Hispanic. Mr. Garcia was discharged when he addressed another salesman in Spanish.<sup>244</sup>

In rejecting Garcia's claim that the English-only policy constituted national origin discrimination in violation of Title VII, the Fifth Circuit determined that national origin is not equated with the language one chooses to speak.<sup>245</sup> The statute does not grant a right allowing an employee to speak a particular language at work. Instead, national origin discrimination occurs when a company imposes prohibitions "that are . . . beyond the victim's power to alter."<sup>246</sup> Therefore, when an employee has the capacity to speak more than one language, it does not exceed the employee's ability to speak the one required by the employer.<sup>247</sup>

In response to Garcia's claim that the rule had a discriminatory impact on a protected class of employees, the court stated:

The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice.<sup>248</sup>

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<sup>243</sup> Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

<sup>244</sup> Although the primary reason for his dismissal was the breach of the English-only rule, other stated reasons included a failure to keep his inventory current, replenish stock, and maintain a clean work area. *Id.* at 266.

<sup>245</sup> *Id.* at 268.

<sup>246</sup> *Id.* at 269.

<sup>247</sup> *Id.* at 270.

<sup>248</sup> *Id.*

The court thus left open the possibility that an English-only rule might constitute national origin discrimination if an employee could only speak a language other than English. For a bilingual employee, however, "nonobservance is a matter of individual preference."<sup>249</sup>

Due to the large number of Asians and Hispanics on the West Coast, many of the English-only cases have been addressed by the Ninth Circuit. In *Jurado v. Eleven-Fifty Corp.*, a radio disc-jockey, who was bilingual in Spanish and English and of Mexican-American and Native-American descent, began to use Spanish words and phrases in an effort to attract Hispanic listeners. When this effort failed to increase the Hispanic audience, he was told to stop speaking Spanish on the air. After he was terminated for continuing to speak Spanish, the disc-jockey claimed disparate treatment, disparate impact, and retaliatory discharge. The Ninth Circuit found no evidence of discriminatory intent required for a claim of disparate treatment because the English-only rule was promulgated due to marketing and ratings reasons rather than racial motivation or national origin discrimination.<sup>250</sup> The court stated: "An employer can properly enforce a limited, reasonable and business-related English-only rule against an employee who can readily comply with the rule and who voluntarily chooses not to observe it as 'a matter of individual preference.'"<sup>251</sup> Following the Fifth Circuit's reasoning, the court found no disparate impact because Mr. Jurado was fluently bilingual and could easily comply with the rule.<sup>252</sup>

After the promulgation of the EEOC Guidelines, the Ninth Circuit recognized the relationship between language and national origin and determined that English-only rules do have a disparate impact on language minority groups.<sup>253</sup> A municipal court instituted a rule requiring all employees to speak only Eng-

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<sup>249</sup> *Id.*

<sup>250</sup> *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987).

<sup>251</sup> *Id.* (citation omitted).

<sup>252</sup> *Id.* The court also determined that Mr. Jurado did not establish a prima facie case of retaliatory discharge because he was not engaging in protected activity and his discharge was not in retaliation for such activity. Mr. Jurado opposed the rule for personal reasons rather than because of concerns regarding discrimination against Hispanics. *Id.*

<sup>253</sup> *Gutierrez v. Municipal Court of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988). Because Ms. Gutierrez was no longer employed by the municipal court, the Supreme Court vacated the decision as moot and determined that the findings had no precedential authority.

lish at work, except during lunch and other breaks and when they were translating for persons not fluent in English. This restriction included bilingual clerks whose duties required working with members of the public who spoke only Spanish. In response to Ms. Gutierrez's claim that the rule constituted racial and national origin discrimination in violation of Title VII, the Ninth Circuit affirmed the decision to issue a preliminary injunction barring enforcement of the rule by following the EEOC guidelines and determining that the rule had a disparate impact on Hispanics.<sup>254</sup> The court stated:

We agree that English-only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. We also agree that such rules can "create an atmosphere of inferiority, isolation, and intimidation." . . . Finally, we agree that such rules can readily mask an intent to discriminate on the basis of national origin.<sup>255</sup>

In its analysis, the Ninth Circuit noted that language is a significant aspect of an individual's national origin, stating that "[t]he cultural identity of certain minority groups is tied to the use of their primary tongue."<sup>256</sup> An individual's "primary language remains an important link to his ethnic culture and identity. The primary language not only conveys certain concepts, but is itself an affirmation of that culture."<sup>257</sup> Thus, "[t]he mere fact that an employee is bilingual does not eliminate the relationship be-

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<sup>254</sup> *Id.* at 1045.

<sup>255</sup> *Id.* at 1040 (citation omitted).

<sup>256</sup> *Id.* at 1039 (citation omitted). The Ninth Circuit and other courts have also recognized the close relationship between an individual's accent and national origin. An employer may not discriminate against an employee with a foreign accent when the accent does not materially interfere with the employee's job performance. Thus, a legitimate, non-discriminatory reason must exist for a "no foreign accent" rule. See *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (stating that "[a]ccent and national origin are obviously inextricably intertwined in many cases"); see also *Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984) (holding that the applicant, a person with a noticeable Filipino accent, met the qualifications for the position and his accent had no adverse effect on his supervisory duties); *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1555 (M.D.N.C. 1984) (stating that discrimination because of a foreign accent may constitute national origin discrimination); *Xieng v. Peoples Nat'l Bank*, 844 P.2d 389, 391-92 (Wash. 1993) (en banc) (holding that an employer violated a state law prohibition against national origin discrimination when he failed to promote an employee because of the employee's foreign accent when the accent did not materially interfere with the plaintiff's job performance); 29 C.F.R. § 1606.6(b)(1) (1995) (EEOC regulations declaring that discrimination based on an individual's foreign accent may be national origin discrimination).

<sup>257</sup> *Gutierrez*, 838 F.2d at 1039 (citation omitted).

tween his primary language and the culture that is derived from his national origin."<sup>258</sup> The court distinguished its decision in *Jurado* as turning on the business necessity of the rule rather than the failure to establish a prima facie case.<sup>259</sup>

In the most recent decision to address the issue of private sector workplace English-only rules, the Ninth Circuit explicitly rejected the EEOC Guidelines and held that an English-only rule applied to bilingual employees was not a per se violation of Title VII.<sup>260</sup> In *Garcia v. Spun Steak Co.*, twenty-four out of a workforce of thirty-three employees were Hispanic. Two employees could speak only Spanish, and the rest had varying levels of English proficiency. The company promulgated a rule prohibiting the use of Spanish during working hours in response to complaints that plaintiffs Garcia and Buitrago harassed and insulted non-Spanish speaking employees in Spanish.<sup>261</sup> The rule stated:

[I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.<sup>262</sup>

In addition to this policy, the company adopted a rule prohibiting offensive racial, sexual, or personal remarks.

In response to a claim by two Hispanic employees that the English-only rule had a disproportionate impact on their national origin group, the court initially conceded that if the English-only policy caused any adverse effects, such an impact would fall disproportionately on the Hispanic employees.<sup>263</sup> The court then examined the employees' three arguments: (1) the policy denied them the ability to express their cultural heritage at work; (2) it denied them a privilege of employment enjoyed by monolingual English-speaking employees; and (3) it created an atmosphere of inferiority, isolation, and intimidation.<sup>264</sup> Although the court recognized that an individual's primary language provided "an

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<sup>258</sup> *Id.* (citation omitted).

<sup>259</sup> *Id.* at 1041 & n.13.

<sup>260</sup> *Garcia v. Spun Steak Co.*, 998 F.2d 1480, *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

<sup>261</sup> *Id.* at 1483.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 1486.

<sup>264</sup> *Id.* at 1486-87. Before beginning its analysis, the court noted that it was not

important link to his ethnic culture and identity," the court determined that Title VII did not protect an employee's ability to express his cultural heritage at work because Title VII only addresses "disparities in the treatment of workers."<sup>265</sup>

Applying the Fifth Circuit's reasoning in *Garcia v. Gloor*, the court concluded that the rule had a significant adverse impact only on those employees who possessed such limited English skills that they were effectively denied the privilege of conversing on the job. An employer may restrict the privilege of conversing at work as long as members of a protected group are not denied the privilege. In contrast, bilingual employees could engage in conversation at work and were thus not adversely impacted since "the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice."<sup>266</sup> The court reasoned that conversing at work was a privilege granted and defined at the employer's discretion.<sup>267</sup>

Finally, the court refused to adopt the EEOC's per se rule that English-only policies amount to a hostile or abusive working environment by creating an atmosphere of inferiority, isolation, and intimidation. Instead, the plaintiff must prove that the policy has a discriminatory effect before the burden shifts to the employer to provide a business justification for the rule. The EEOC guideline contravened the established burdens of proof and ignored the absence of legislative history to support a presumption of discrimination. The court thus concluded that the plaintiffs failed to make out a prima facie case of discrimination under Title VII.<sup>268</sup>

#### IV

#### DISPARATE IMPACT ANALYSIS OF ENGLISH- ONLY RULES

Title VII is concerned with intentional discrimination as well as employment practices and policies that lead to disparate treatment of classes of employees.<sup>269</sup> Two theories of liability exist for discrimination under Title VII: disparate treatment and dis-

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bound by the reasoning in *Gutierrez* because it had been vacated as moot. *Id.* at 1487 n.1.

<sup>265</sup> *Id.* at 1487.

<sup>266</sup> *Id.* (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 1490.

<sup>269</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).



parate impact.<sup>270</sup> Disparate treatment requires proof of discriminatory intent, while disparate impact focuses on the consequences of the employment policy or practice rather than the motivation.<sup>271</sup>

### A. *Disparate Impact*

Although the EEOC and the courts analyze English-only rules under the disparate impact theory, such a rule varies from the typical facially neutral employment policy analyzed under the theory. A facially neutral policy disqualifies members of the majority class as well as the protected minority class.<sup>272</sup> For example, in *Griggs v. Duke Power Co.*, the Court stated that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."<sup>273</sup> This opinion implies that neutral selection devices such as a high school diploma or general intelligence test disqualified Whites as well as Blacks.<sup>274</sup> Similarly, a height and weight requirement disqualifies both men and women.<sup>275</sup> In contrast, an English-only rule never disqualifies a member of the majority class; no adverse impact falls on individuals whose primary language is English.<sup>276</sup>

<sup>270</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985-87 (1988).

<sup>271</sup> *Id.* at 988; *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990); *see Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The court stated:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

*Id.*

<sup>272</sup> *See Perea, supra* note 75, at 289-90.

<sup>273</sup> *Griggs*, 401 U.S. at 431.

<sup>274</sup> *Id.* at 427-28.

<sup>275</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

<sup>276</sup> *See Perea, supra* note 75, at 290. Professor Perea argues that English-only rules have been inaccurately characterized as facially neutral. Instead, they "should be described as having an exclusive adverse impact that constitutes the 'functional equivalent' of national origin discrimination." *Id.*; *see also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 298-99 (1971). *See generally* Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 923-24 (1979) (discussing Professor Fiss' functional equivalence theory). While an individual whose primary language is English might be restricted from using another language by such a rule, a relationship between the secondary language and that individual's national origin would likely not exist. Perea, *supra* note 75, at 290 n.151. Based on the "functional equivalence" of primary language and national origin, Professor Perea concludes that an employer must justify an English-only rule under the BFOQ defense rather than as a business necessity. *Id.* at 295. Because the courts will continue to apply the dispa-

The Civil Rights Act of 1991 provided statutory guidelines for the adjudication of disparate impact suits under Title VII in response to a series of Supreme Court decisions which increased the burden for victims of discrimination, and also provided punitive and compensatory damages for ethnic minority discrimination if a claimant could not recover them under section 1981.<sup>277</sup> Under the disparate impact theory, a plaintiff must first identify a specific, seemingly neutral practice or policy that has a significant adverse impact on members of a protected class.<sup>278</sup> A plaintiff must do more than merely raise an inference of discrimination; the plaintiff "must actually prove the discriminatory impact at issue."<sup>279</sup> In a disparate impact case in which a plaintiff alleges that a selection criterion excludes protected applicants from jobs or promotions, discriminatory impact is shown by statistical disparities between the number of members of the protected class in the qualified applicant pool and the number in the related segment of the workforce.<sup>280</sup> Yet when the alleged disparate impact is on the terms, conditions, or privileges of employment, the plaintiff must prove the existence of adverse effects of the policy, that the impact of the policy is on conditions, terms, or privileges of employment of the protected class, that the adverse effects are significant, and that the employee population in general is not affected by the policy to the same degree.<sup>281</sup>

Once a prima facie case is established, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."<sup>282</sup> The Civil Rights Act of 1991 changed the burden

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rate impact analysis to such practices, English-only rules should be considered to have an exclusive adverse impact, thus requiring a higher standard of business necessity such as proving that the rule is the least discriminatory alternative. *Id.* at 290, 298.

<sup>277</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>278</sup> *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989).

<sup>279</sup> *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990).

<sup>280</sup> *Wards Cove*, 490 U.S. at 650-51; *Spun Steak*, 998 F.2d at 1486.

<sup>281</sup> *Spun Steak*, 998 F.2d at 1486.

<sup>282</sup> 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. IV 1992). For criticism of the business necessity standard because of its inconsistent application, see SCHLEI & GROSSMAN, *supra* note 168, at 1328-29; George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1312 (1987) ("[D]isarray . . . has resulted in the federal courts from uncertainty over what the defense requires the defendant to prove."); Chandler, *supra* note 276, at 912 ("[L]ower courts have been afforded a considerable degree of freedom in shaping the contours of the defense."); see also *Contreras v. City of Los Angeles*, 656 F.2d

of proof scheme established in the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*<sup>283</sup> so that the burden of proof shifted to the employer to prove that the employment policy or practice was justified by a business necessity.<sup>284</sup> The Court in *Wards Cove* had changed the inquiry to a reasoned consideration of the employer's asserted business justification.<sup>285</sup> The employer merely had a burden of producing evidence of a business justification, while the employee retained the burden of persuasion that the proffered justification was invalid, or demonstrating the availability of less discriminatory alternative practices.<sup>286</sup>

Demonstrating a business necessity requires more than merely asserting a convenience or preference.<sup>287</sup> Instead, the policy or practice must significantly and objectively serve the employer's legitimate business purposes.<sup>288</sup> Proof by the plaintiff of a less discriminatory alternative eliminates the employer's justification.<sup>289</sup>

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1267, 1275-76 (9th Cir. 1981) ("[C]ourts differ on just what an employer must prove to discharge its burden.").

<sup>283</sup> *Wards Cove*, 490 U.S. at 642.

<sup>284</sup> See, e.g., *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2792-97 (1988) (Blackmun, J., concurring) (stating that burden of proof shifts to the defendant to establish that the employment practice is a business necessity); *Griggs*, 401 U.S. at 432 ("Congress . . . placed on the employer the burden of showing that [the challenged requirement bears] a manifest relationship to the employment in question."); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (stating that employer is required to "prove[ ] that the challenged requirements are job related").

<sup>285</sup> *Wards Cove*, 490 U.S. at 659.

<sup>286</sup> *Id.* For a criticism of *Wards Cove*, see Perea, *supra* note 75, at 297-99.

<sup>287</sup> See, e.g., *Wards Cove*, 490 U.S. at 659 (stating that a "mere insubstantial justification . . . will not suffice"); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971) (stating that "[m]anagement convenience and business necessity are not synonymous"); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979) (stating that "[a]dministrative convenience is not a sufficient justification for the employer's practices").

<sup>288</sup> See *Wards Cove*, 490 U.S. at 659; *Griggs*, 401 U.S. at 432; Rutherglen, *supra* note 282, at 1321; Chandler, *supra* note 276, at 934 ("The standard of job-relatedness is an objective one . . . [O]nly if the practice *in fact* serves business purposes can it be deemed 'necessary'. . .").

<sup>289</sup> *Wards Cove*, 490 U.S. at 659-61; Rutherglen, *supra* note 282, at 1327 ("[I]f the defendant has not considered an alternative . . . procedure with obviously greater validity, then it has undermined the procedure that it did choose."); Perea, *supra* note 75, at 300 ("If a plaintiff can show that less discriminatory alternatives exist that would accomplish the employer's purpose equally well or more effectively with less adverse impact, this proof undermines the justification for the employer's practice.").

### B. Deference to the EEOC

When a statute is silent or ambiguous, a court will traditionally defer to the interpretation by the agency responsible for enforcing the Act when the interpretation is "based on a permissible construction of the statute."<sup>290</sup> Thus, "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."<sup>291</sup>

Applying this standard, the EEOC's interpretation is not always followed by the courts.<sup>292</sup> The level of deference afforded an EEOC interpretation of Title VII "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>293</sup> An agency interpretation is entitled to greater deference when Congress is aware of the interpretation and chooses not to change it when amending the statute in other respects.<sup>294</sup>

Based on these established criteria, the EEOC's guidelines on English-only rules are entitled to substantial deference. Since the adoption of the guidelines three years after the enactment of Title VII, the EEOC has consistently held its position which has been subjected to full notice and review. In fact, when Congress amended Title VII in 1991 to clarify the standards for proving disparate impact discrimination following the Court's decision in *Wards Cove*, the Senate discussed the EEOC's guidelines and did

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<sup>290</sup> *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 185 (1989) (Marshall, J., dissenting) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); see also *Griggs*, 401 U.S. at 433-34 ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.").

<sup>291</sup> *Betts*, 492 U.S. at 171.

<sup>292</sup> See, e.g., *id.* (rejecting EEOC view that a retirement system denying disability retirement benefits to employees over 60 violated the Age Discrimination in Employment Act); *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (rejecting the EEOC's position on the plaintiff's burden of proof in a disparate treatment case); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (rejecting EEOC determination that discrimination against aliens was based on birth outside the United States and violated Title VII).

<sup>293</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 142 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

<sup>294</sup> *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

not alter them.<sup>295</sup> In *Garcia v. Spun Steak Co.*, the Court of Appeals for the Ninth Circuit incorrectly stated that the EEOC's interpretation was not entitled to deference because it "presum[ed] that an English-only policy has a disparate impact in the absence of proof."<sup>296</sup> Applying its experience and carefully reasoned analysis, the EEOC has correctly concluded that English-only rules invariably have a disparate impact on national origin minority groups. In contrast to its position in *Spun Steak*, the Ninth Circuit recently recognized in another context that language is a close proxy for national origin and that such rules have an adverse impact which falls almost exclusively upon Hispanics and other national origin minorities.<sup>297</sup>

### C. Business Justifications

Employers have asserted that English-only rules promote racial harmony by reducing racial tension and fear on the part of customers and fellow employees.<sup>298</sup> In support of the rules, employers have expressed the concern of customers and other employees that Spanish was being used for rude or insubordinate remarks.<sup>299</sup> Rather than assuaging these fears by promoting ra-

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<sup>295</sup> On the floor of the Senate, Senator DeConcini stated that many of his constituents had complained about English-only rules in the workplace, and he asked Senator Kennedy, a sponsor of the legislation amending Title VII, whether the EEOC's guidelines would continue in effect. Senator Kennedy replied that the guidelines had been effective and that the new legislation would not affect their validity. 137 CONG. REC. S15,489 (daily ed. Oct. 30, 1991).

<sup>296</sup> *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490, *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

<sup>297</sup> *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1241-42 (9th Cir. 1994), *reh'g granted*, 53 F.3d 1084 (9th Cir. 1995).

<sup>298</sup> *See, e.g., Spun Steak*, 998 F.2d at 1483; *Gutierrez v. Municipal Court of S.E. Judicial Dist.*, 838 F.2d 1031, 1042 (claiming that the rule reduced disruptions by "prevent[ing] the workplace from turning into a 'Tower of Babel'"); *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 754 (D. Or. 1973) (prohibiting Spanish necessary due to fear that Chicanos were talking about White customers); EEOC Dec. No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1821 (1981) (other employees and customers objected to Spanish conversations between co-workers); *see also Perea*, *supra* note 75, at 302 n.224 (asserting that this racial tension and fear is more properly characterized as "cultural, linguistic, or ethnic tension").

<sup>299</sup> *See Dimaranan v. Pomona Valley Hosp. Medical Ctr.*, 775 F. Supp. 338 (C.D. Cal. 1991). In response to complaints from other nurses that Filipina nurses, including Ms. Dimaranan, were speaking in Tagalog, the native language of the Philippines, the Head Nurse warned them not to speak Tagalog. *Id.* at 341. The court found that an English-only rule did not exist since Spanish could be spoken and the rule restricting the use of Tagalog was shift specific. *Id.* at 345. In addition, the court determined that legitimate, non-discriminatory reasons existed for the rule be-

cial harmony, English-only rules actually increase racial tension in the workplace.<sup>300</sup> In *Dimoranan v. Pomona Valley Hospital Medical Center*, an expert witness testified that language restrictions merely shift the sense of tension from the monolingual to the multilingual group, and described another hospital which eliminated such a restriction and replaced it with a course in cross cultural communication and cultural diversity training, which resulted in increased employee morale.<sup>301</sup> Evidence in *Gutierrez v. Municipal Court of Southeast Judicial District* indicated that the working atmosphere substantially deteriorated as a result of an English-only rule; racial animosity increased between Hispanics and non-Spanish speaking employees, Hispanics felt belittled by the rule, and Hispanic employees were subjected to a series of discriminatory remarks.<sup>302</sup> Rather than implementing an English-only rule to prevent rude or insubordinate comments, an employer could prohibit such comments in all languages and then discipline any offending employees. While it would be more difficult to discipline an employee making comments in a language not understood by the employer, this difficulty does not justify a broad language restriction.

In addition, an asserted justification is that English-only rules promote the use of English.<sup>303</sup> While promoting English may be a goal of state statutes declaring English the official state language, such a justification fails to fulfill the requirement for a business necessity of significantly serving an employer's legitimate business purpose.<sup>304</sup> The employer must demonstrate that

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cause of the tension on a disorganized floor: "It is clear that management was not primarily concerned with the use of Tagalog, but rather with the breakdown of cohesion [in] the . . . unit and the effect of dissension upon the well-being and safety of mothers and their newborns." *Id.* at 344; see also *Spun Steak*, 998 F.2d at 1483; *Gutierrez*, 838 F.2d at 1042-43; *Gloor*, 618 F.2d at 267.

<sup>300</sup> See *Gutierrez*, 838 F.2d at 1042-43; *Hernandez*, 368 F. Supp. at 754 (tavern owner's prohibition of foreign languages led to racial tension and assaults upon Hispanic customers).

<sup>301</sup> Imahara & Kim, *supra* note 10, at 117, n.41, 121. See also 29 C.F.R. § 1606.7(a) (1995) (stating that prohibiting employees from speaking their primary language may create an "atmosphere of inferiority, isolation and intimidation based on national origin"); Perea, *supra* note 75, at 303 (describing such fears as "exactly the kind of stereotyped judgments that Title VII was designed to eliminate").

<sup>302</sup> Ugalde, *supra* note 3, at 1226 nn.106-07.

<sup>303</sup> *Gutierrez*, 838 F.2d at 1042 (employer argued that the rule was required by a state statute making English the official state language); *Gloor*, 618 F.2d at 267 (employer claimed that the rule would improve the employees' fluency in English).

<sup>304</sup> Cf. *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980) (plurality opinion), *cert. denied*, 450 U.S. 965 (1981) ("If this personal compassion [for

improving the employees' fluency in English relates to a specific business purpose rather than a general societal goal.<sup>305</sup> In the event an employer truly wished to increase English fluency in the workforce, a less discriminatory alternative would be to offer incentives or classes to employees.

Employers have also claimed that the rules are necessary to enhance worker safety and product quality.<sup>306</sup> Although safety and efficiency are established grounds for a business necessity, the employer must still demonstrate that the rule is necessary due to workplace hazards in order to prevent accidents and during an emergency.<sup>307</sup> The employer would be required to

pregnant stewardesses] can be attributed to corporate policy it is commendable, but in the area of civil rights, personal . . . decisions not affecting business operations are best left to individuals who are the targets of discrimination."); *Dothard*, 433 U.S. at 331 n.14 (stating that statute did not establish a business justification in a sexual discrimination context); see also *Perea*, *supra* note 75, at 306.

<sup>305</sup> *Griggs*, 401 U.S. at 431-32 ("If an employment practice cannot be shown to be related to job performance, the practice is prohibited . . . [A]ny given requirement must have a manifest relationship to the employment in question."); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971) ("[T]he challenged practice must effectively carry out the business purpose it is alleged to serve.") (footnote omitted); *United States v. Bethlehem Steel Co.*, 446 F.2d 652, 662 (2d Cir. 1971) (stating that the criteria must be "an irresistible demand" of the job); see also SCHLEI & GROSSMAN, *supra* note 168, at 359 (criteria must be reasonably necessary for job performance).

<sup>306</sup> See, e.g., *Spun Steak*, 998 F.2d at 1483 ("[E]mployees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, . . . [and] the U.S.D.A. inspector . . . spoke only English and thus could not understand if a product-related concern was raised in Spanish."); *Saucedo v. Brothers Well Serv., Inc.*, 464 F. Supp. 919, 921 (S.D. Tex. 1979) (English-only rule necessary during drilling of an oil well); EEOC Dec. No. 83-7, 2 Empl. Prac. Guide (CCH) ¶ 6836 (1983) (stating that English-only rule is necessary for effective communication during emergencies and to prevent and control dangers in a refinery).

<sup>307</sup> See, e.g., *Dothard*, 433 U.S. at 331 n.14; *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 997 (5th Cir. 1984); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676-77 (9th Cir. 1980); *Craig v. County of Los Angeles*, 626 F.2d 659, 666-68 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1374, 1379-81 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1341-42 (9th Cir. 1977), *vacated*, 440 U.S. 625 (1979); see also *MacLennan v. American Airlines, Inc.*, 440 F. Supp. 466, 472 (E.D. Va. 1977) ("[T]he incantation of a safety rationale is not an abracadabra to which [a] [c]ourt must defer judgment."); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 108 (1974). For an example of an acceptable policy under the EEOC guidelines, see EEOC Dec. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861 n.2 (1983): "To insure safe and efficient operations in the . . . Refinery terminal, laboratory and processing areas; and to insure that instructions are understandable and accurately communicated, all employees are required to speak only English while performing their job duties. Furthermore, during emergency conditions all refinery employees shall speak only English." The

demonstrate that the rule actually and effectively contributed in a significant manner to improved safety and efficiency.<sup>308</sup> Yet in many circumstances, this asserted justification supports an English-proficiency requirement rather than a language restriction.<sup>309</sup>

## V

### RELATIONSHIP BETWEEN LANGUAGE AND NATIONAL ORIGIN

As the Ninth Circuit recognized in *Yniguez* and *Spun Steak*, a monolingual individual can not make a choice between communicating in one language or another.<sup>310</sup> Communication by that individual can only occur in a single language which may not be English. However, even for bilingual individuals, language provides an important link to an individual's ethnic culture and identity.<sup>311</sup> For members of language minority groups as well as many other Americans, "speech is an indicator of cultural identity second in importance only to physical appearance. Further, accent, language choice, verbal style, choice of words, phrases, and gestures act as a primary vehicle for creative expression by individuals and by groups."<sup>312</sup> A prohibition against the use of non-English languages ignores the fact that language choice is not merely a mode of communication; the chosen language is itself a form of communication conveying meaning and nuance through the selection of words, tone, social and cultural references, and expression of values.<sup>313</sup>

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EEOC concluded that the rule was narrowly drawn for the "purpose of assuring effective communication . . . during specified times and in specified areas where the potential [existed for] fires, explosions and other casualties . . ." *Id.* at 1862.

<sup>308</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989); *Perea*, *supra* note 75, at 315.

<sup>309</sup> *See, e.g., Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 660 F.2d 1217, 1222 (7th Cir. 1981) (stating that virtually every position in a hospital required the ability to speak and read some English). A requirement that employees be fluent in English violates Title VII if it has no relationship to the job or if it purposefully discriminates against individuals of a particular national origin; *see also Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375 (S.D.N.Y. 1978).

<sup>310</sup> *Yniguez v. Arizonans For Official English*, 42 F.3d 1217, 1231 n.17 (9th Cir. 1994), *reh'g granted*, 53 F.3d 1084 (9th Cir. 1995); *Garcia v. Spun Steak*, 998 F.2d 1480, 1488, *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

<sup>311</sup> *Spun Steak*, 998 F.2d at 1487.

<sup>312</sup> CONKLIN & LOURIE, *supra* note 30, at 279.

<sup>313</sup> *See* Joshua A. Fishman, *The Sociology of Language: An Interdisciplinary So-*



[P]revailing mainstream attitudes deny any relationship between language and culture, arguing that revocation of language rights in no way compromises the integrity of cultural freedoms upon which our nation was constituted. Paradoxically, while language is generally viewed as nothing but a means of communication, standard English is held up as the only appropriate embodiment of the national character.<sup>314</sup>

Courts such as the Fifth Circuit in *Garcia* presuppose that language and ethnic culture are not related by concluding that language restrictions do not interfere with ethnic identity or cultural expression.<sup>315</sup> Yet studies by sociology and sociolinguistic scholars refute this conclusion regarding language and ethnicity.<sup>316</sup> Ethnicity encompasses "both the sense and the expression of 'collective, intergenerational cultural continuity,' i.e. the sensing and expressing of links to 'one's own kind (one's own people).'"<sup>317</sup> The term ethnicity implies a sense of attachment to a group, a sense of "peoplehood."<sup>318</sup> Scholars of language and ethnicity recognize language as a fundamental expression of an individual's cultural ethnicity.<sup>319</sup> For Hispanic individuals, as

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*cial Science Approach to Language in Society, in* 1 ADVANCES IN THE SOCIOLOGY OF LANGUAGE, 217, 219 (Joshua Fishman ed., 1971).

<sup>314</sup> CONKLIN & LOURIE, *supra* note 30, at 279.

<sup>315</sup> See *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (determining that "[n]either [Title VII] nor common understanding equates national origin with the language that one chooses to speak").

<sup>316</sup> See *Perea*, *supra* note 75, at 276.

<sup>317</sup> *Mother-Tongue Claiming in the United States Since 1960, supra* note 20, at 4.

<sup>318</sup> MILTON GORDON, ASSIMILATION IN AMERICAN LIFE 23 (1964); see also Michael Novak, *Cultural Pluralism for Individuals: A Social Vision*, in PLURALISM IN A DEMOCRATIC SOCIETY 25, 29-34 (Melvin Tumin & Walter Plotch eds., 1977) (on various definitions of ethnicity).

<sup>319</sup> See *Mother-Tongue Claiming in the United States Since 1960, supra* note 20, at 70-71:

Ethnicity is . . . belonging or pertaining to a phenomenologically complete, separate, historically deep cultural collectivity, a collectivity polarized on perceived authenticity. This "belonging" is experienced and interpreted physically (biologically), behaviorally (culturally) and phenomenologically (intuitively). . . . [C]haracterized as it is on all three [levels] it is a very mystic, moving and powerful link with the past and an energizer with respect to the present and future. It is fraught with moral imperatives, with obligations to "one's own kind," and with wisdoms, rewards and proprieties that are both tangible and intangible. . . . As such, it is language-related to a very high and natural degree, both overtly (imbedded as it is in verbal culture and implying as it does structurally dependent intuitions) and covertly (the supreme symbol system [language] quintessentially symbolizes its users and distinguishes between them and others). Indeed this is so to such a degree that language and ethnic authenticity may come to be viewed as highly interdependent.

well as other closely-knit ethnic groups, language and culture intertwine to both reflect and shape the individual's reality.<sup>320</sup> The connection between national origin and language has also been recognized by many legal scholars.<sup>321</sup> The continuing vitality of non-English language newspapers, as well as radio and television broadcasts, reflects this strong bond between an individual's native language and cultural identity.<sup>322</sup> The important relationship between language and ethnicity is also recognized and preserved in the approximately 6600 non-English language schools in the

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*See also* Fishman, *supra* note 313, at 219 (“[Language] is not merely a *carrier* of content, whether latent, or manifest. Language itself *is* content, a referent for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.”); CONKLIN & LOURIE, *supra* note 30, at 279 (“[F]or many Americans, speech is an indicator of cultural identity second in importance only to physical appearance. Further, accent, language choice, verbal style, choice of words, phrases, and gestures act as a primary vehicle for creative expression by individuals and by groups.”); Karst, *supra* note 8, at 308 n.20 (“‘[E]thnicity’ and ‘ethnic identity’ . . . refer to one’s connection with a group defined by the sharing of one or more of a number of overlapping traits such as ancestral origins, race, religion, language, and culture.”).

<sup>320</sup> Jane Macnab Christian & Chester C. Christian, Jr., *Spanish Language and Culture in the Southwest*, in LANGUAGE LOYALTY IN THE UNITED STATES 280, 300 (Joshua Fishman ed., 1966). *See also* *Gloor*, 618 F.2d at 267 (expert testimony identifying “Spanish language [as] the most important aspect of ethnic identification for Mexican-Americans”).

<sup>321</sup> *See, e.g.*, Perea, *supra* note 75, at 276 (“Primary language, like accent, is closely correlated and inextricably linked with national origin.”) (footnote omitted); McDougal, et al., *supra* note 28, at 152 (“[L]anguage is commonly taken as a prime indicator of an individual’s group identifications.”) (footnote omitted); Cutler, *supra* note 11, at 1165 (“Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself.”) (footnote omitted); Domengeaux, *supra* note 73, at 1167 (“Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity.”); Piatt, *supra* note 135, at 898-901; Note, *Official English*, *supra* note 45, at 1355; Karst, *supra* note 8, at 351-57.

<sup>322</sup> *Mother-Tongue Claiming in the United States Since 1960*, *supra* note 20, at 224, 344-45 (From 1960 to 1980, the number of non-English newspapers and radio and television services significantly increased. During that time period, the number of Spanish language publications rose from 49 to 165; and by 1982, 275 television stations devoted at least part of the day to non-English programming); *see also* Nathan Glazer, *The Process and Problems of Language-Maintenance: An Integrative Review*, in A PLURALISTIC NATION: THE LANGUAGE ISSUE IN THE UNITED STATES 33 (Margaret A. Laurie & Nancy Faires Conklin eds., 1978) (“In America, the immigrant wants to preserve, as far as possible, his heritage from the old country. These [sic] are represented preeminently by his language and his religion. At the same time, he wants to participate in the common life and find a place in the American community. In these two motives, we have at once the problem of the foreign-language press and its solution.”) (citation omitted).

United States, which are "unequivocally committed to the view that their particular language and ethnicity linkage is vital and, hopefully, eternal."<sup>323</sup>

The inextricable connection between language and ethnicity also exists for bilingual individuals.<sup>324</sup> The primary language provides bilingual individuals with associations and notions of family, friendship, and intimacy.<sup>325</sup> The EEOC guidelines recognize this connection by noting that it is "common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language."<sup>326</sup> While bilingualism is often defined as the ability "to speak two languages with nearly equal facility,"<sup>327</sup> bilingualism should be considered "as a spectrum of abilities in a second language ranging from minimal ability to communicate in a second language to equal facility in two languages."<sup>328</sup> The Ninth Circuit's analysis in *Spun Steak* mistakenly assumed that bilingual employees are "fluent in both English and Spanish."<sup>329</sup> This assumption ignores

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<sup>323</sup> *Mother-Tongue Claiming in the United States Since 1960*, *supra* note 20, at 365. The majority of these schools teach in Spanish, Hebrew, Yiddish, Greek, and Pennsylvania German. *Id.* at 242.

<sup>324</sup> Perea, *supra* note 75, at 279. *But cf. Gloor*, 618 F.2d at 270 (1981) (reasoning that "the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice." The court also concluded that the English-only rule "did not forbid cultural expression to persons for whom compliance with it might impose hardship.").

<sup>325</sup> Fishman, *supra* note 313, at 251 (noting that Spanish-speaking bilinguals primarily associate their native Spanish language with the intimacy value cluster of family and friendship); Lawrence Greenfield, *Situational Measures of Normative Language Views in Relation to Person, Place and Topic Among Puerto Rican Bilinguals*, in 2 *ADVANCES IN THE SOCIOLOGY OF LANGUAGE* 17, 33 (Joshua Fishman ed., 1972) ("Use of Spanish was claimed primarily in the domain of family, secondarily for the domains of friendship and religion, and least of all in those of education and employment, while the reverse held true for English.").

<sup>326</sup> 29 C.F.R. § 1606.7(c) (1995).

<sup>327</sup> Perea, *supra* note 75, at 292 (quoting *RANDOM HOUSE COLLEGE DICTIONARY* 133 (1972)).

<sup>328</sup> *Id.* Although not immutable in the same sense as the personal characteristics of race, color, or sex protected under Title VII, Professor Perea contends that for many individuals primary language is "practically immutable" based on the difficulty for adults of acquiring a second language, especially when they are members of a language minority group. Perea, *supra* note 75, at 280; see John H. Schumann, *Second Language Acquisition: The Pidginization Hypothesis*, in *SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS* 256 (Evelyn Mascussen Hatch ed., 1978); Rina G. Shapira, *The Non-learning of English: Case Study of an Adult*, in *SECOND LANGUAGE ACQUISITION*, *supra*, at 246 (both presenting case studies of Spanish-speaking adults' difficulty in learning English).

<sup>329</sup> *Spun Steak*, 998 F.2d at 1487.

the range of language proficiency levels in individuals identified as bilingual. While most first-generation adult immigrants acquire some level of functional bilingualism, only a few become truly fluent in English.<sup>330</sup> Similarly, the Fifth Circuit in *Garcia* incorrectly viewed a bilingual individual's choice of language as a matter of personal preference.<sup>331</sup> Individuals who acquire a second language often speak either English or their native language as circumstances warrant, alternating between languages in what is linguistically termed "code-switching."<sup>332</sup> Thus, an English-only rule severely restricts a person with limited English proficiency as well as an individual with equal facility in two languages in his or her ability to communicate.<sup>333</sup>

### CONCLUSION

Our nation "has historically prided itself on welcoming immigrants with a spirit of tolerance and freedom," including those who speak a language other than English.<sup>334</sup> Yet during periods of economic and social turmoil, the Statue of Liberty's torch has dimmed, no longer providing a beacon of welcome to the world's immigrants. At such times, a shadow of discrimination and distrust is cast over the nation's ethnic minority groups, citizens and legal immigrants alike. The official English movement and the simultaneous increase in English-only rules in the workplace provide the most recent examples of the xenophobia and discriminatory policies directed at language minorities. The international community and the United States have recognized the oppression associated with language restrictions, ratifying Article 27 of the International Covenant on Civil and Political Rights, which provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their

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<sup>330</sup> See CONKLIN & LOURIE, *supra* note 30, at 160.

<sup>331</sup> See *Gloor*, 618 F.2d at 270.

<sup>332</sup> See CONKLIN & LOURIE, *supra* note 30, at 161-62 (Code-switching permits the individual to effectively communicate in the language that most accurately conveys the idea).

<sup>333</sup> See *Gloor*, 618 F.2d at 270 ("To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth.").

<sup>334</sup> *Yniguez*, 42 F.3d at 1242.

own religion, or to use their own language."<sup>335</sup> Despite the overt negation of protected rights by language restrictions, the Supreme Court will likely conclude that the prohibition against national origin discrimination does not include English-only rules in light of the Court's propensity towards strict construction of civil rights statutes.<sup>336</sup>

A tension exists between the melting pot metaphor, in which cultural traits and ethnic differences are eliminated through assimilation into a homogeneous American identity with predominately Anglo characteristics, and the rich traditions preserved by cultural pluralism, in which cultural traits add to the richness of the American experience. As Justice Douglas wrote: "The melting pot is not designed to homogenize people, making them uniform in consistency . . . . [Rather, it] depicts the wide diversities tolerated . . . under one flag."<sup>337</sup> The language conformity enforced through an English-only policy has a direct and negative impact on members of language minority groups. Rather than allowing xenophobia and nativism to provide support for forced cultural assimilation, the diverse and multicultural character of our society should be recognized and celebrated as one of our nation's greatest strengths.

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<sup>335</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, T.S. No. 14,668, at 179.

<sup>336</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1992) ("However uneven the Court was in protecting individual liberties through statutory interpretation in the 1970s, it was significantly less protective in the 1980s."); Charles B. Craver, *Radical Supreme Court Justices Endeavor to Rewrite the Civil Rights Statutes*, 10 THE LABOR LAWYER 727, 728 (1994) ("[The] five-Justice conservative bloc . . . was intent on restructuring the employment discrimination laws.").

<sup>337</sup> *Defunis v. Odegaard*, 416 U.S. 312, 334 (1974) (Douglas, J., dissenting). By forcing conformity and assimilation, individuals feel a sense of inferiority and stigmatization. See Karst, *supra* note 8, at 324-25 ("The pressure to conform carries with it an implication that members of the unorthodox cultural group are inferior. Correspondingly, the subordination of a cultural group . . . undermines confidence in the group's values and perspectives, with the long-term effect of impairing the perceived worth of the group's ethnic identity. . . .") (footnote omitted).