Loose Ends in a Tattered Fabric: The Inconsistency of Language Rights in the United States

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I. INTRODUCTION

In the spring of 2006, after a decade in remission, the campaign for "Official English" flared up again in the Congress of the United States. An amendment to immigration legislation, passed by the Senate on May 18, designated English as the "national language". More significantly, the measure sought to restrict access to government in other languages:

> Unless otherwise authorized or provided by law, no person has a right, entitlement, or claim to have the Government of the United States or any of its officials or representatives act, communicate, perform or provide services, or provide materials in any language other than English. If exceptions are made, that does not create a legal entitlement to additional services in that language or any language other than English.[1]

Senator James Inhofe, the Oklahoma Republican who sponsored the amendment, argued that it was necessary to clarify to immigrants their responsibility to learn the English language, adding (somewhat contradictorily) that the importance of learning English was already recognized by the vast majority of foreign-born Americans. Only "extremist groups" would be "offended" by the idea of banning most language rights for ethnic minorities, he asserted. In any case, Inhofe said, U.S. courts had consistently ruled "that civil rights laws protecting

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1 U.S. Senate, Amendment No. 4064, Cong. Rec., vol. 152, 62, at S4735 (18 May 2006).

against national origin ... discrimination do not create rights to Government services and materials in languages other than English".[2]

Rising in opposition, Senator Richard Durbin, Democrat of Illinois, warned that the amendment would deprive many U.S. residents of rights and services that they would otherwise enjoy if not for the language barrier. By prohibiting bilingual accommodations at government's discretion, Durbin argued, Congress would — in effect — authorize discrimination against racial and ethnic minorities, breaking with long-established legal principles.[3] As we shall see, both senators presented a defensible interpretation of U.S. law.

Although it passed, 63-34, largely along party lines,[4] the National Language proposal ultimately failed. Inhofe's amendment died at year's end, when Congress adjourned before a broader agreement could be reached on the immigration bill to which it was attached. Nevertheless, the measure served to revive a contentious and unresolved debate over language policy. In particular, it highlighted the precarious and inconsistent status of language rights in the United States.

This paper will survey those rights as they have developed historically; analyze the legal principles that bear on language policies in education, employment, judicial proceedings and government access; analyze the constitutional issues posed by Official English; and survey the prospects for language rights in the future.

II. LEGAL UNCERTAINTIES

A key question that arose during the National Language debate, yet went unanswered, was why Senator Inhofe thought it important to restrict a class of "rights, entitlements, and claims" that is already quite limited. Only a very few rights relating to language are enumerated in

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2 U.S., Cong. Rec., vol. 152, 62, at S4735-36, S4755 (18 May 2006).

3 U.S., Cong. Rec., vol. 152, 62, at S4737-39, S4752-53 (18 May 2006).

4 Senator Mary Landrieu, Democrat of Louisiana, initially voted in favour but changed her vote a week later. Only one Republican, Senator Pete Domenici of New Mexico, voted no. Several other members of his party who had previously opposed English-only bills, such as Senator John McCain of Arizona, agreed to support the amendment after Inhofe replaced the term "official language" with "national language". (Legally speaking, the change was a distinction without a difference.) Democrats then proposed an alternative measure declaring English "the common and unifying language of the United States", while declaring no intent to "diminish or expand any existing rights . . . relative to services or materials provided by the Government . . . in any language other than English". It passed also, by a vote of 58-39, muddying the legal waters that courts might later have to navigate in determining Congressional intent.

federal statutes — notably, the bilingual provisions of the *Voting Rights Act* (1975)[5] and the due process guarantees of the *Court Interpreters Act* (1978).[6] These laws are far from broad entitlements; they apply only in specific circumstances. While various other statutes mention language accommodations, they are generally vague, advisory or unenforceable. For example, the *No Child Left Behind Act* (2001),[7] which authorizes federal support for public schools, instructs local officials to communicate with parents in a language they can understand, but only "to the extent practicable".[8] Generally speaking, the common practice has been to address such issues on an *ad hoc* basis. Neither state nor federal governments have ever formulated a comprehensive policy on language.

The most expansive statement in this area was issued by President Clinton in 2000. Known as Executive Order 13166,[9] it requires federal agencies, contractors, and grantees to develop plans to expand limited-English speakers' access to public programs and services of all kinds. If actively enforced, this directive could have far-reaching effects. In theory, it applies not only to the federal government but to all recipients of federal funding throughout the country. Yet the order's legal status remains nebulous. It provides no actual guarantees to language-minority citizens or residents regarding bilingual services to be provided — only a set of procedures designed to expand such services where feasible and appropriate. Observance of these procedures has been uneven thus far, with certain agencies, such as the U.S. Department of Education, effectively ignoring them.

Thus it is fair to say that, lacking firm roots in American legal traditions, the rights of language-minority groups are vulnerable to changing political winds. English-only restrictions, for example, have been enacted or rejected depending on the strength or weakness of anti-immigrant activism. After the mid-1990s, the Republican majority in Congress lost its enthusiasm for such legislation as the party sought to attract Hispanic voters, the fastest growing segment of the American electorate. Then, in 2006, the trend abruptly reversed, as rising complaints about "illegal aliens" led conservative politicians to

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5 42 U.S.C. § 1973aa.

6 28 U.S.C. § 1827.

7 Pub. L. No. 107-110.

8 20 U.S.C. § 3302.

9 U.S., President, Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency*, Fed. Reg. 65, no. 159 (August 16, 2000): 50121.

champion the Inhofe amendment. Soon after, several localities adopted ordinances prohibiting public services in any language but English, and Arizona became the 24th state to adopt English as its official language.[10] Serious constitutional questions persist about the strictest of these English-only laws; an earlier Arizona measure was invalidated on constitutional grounds.[11] Yet, especially at the federal level, statutes and court decisions that directly address language issues, much less define language rights, remain remarkably rare. Hence the perennial threat of majoritarian excesses.

This is not to say that the needs of minority-language speakers are routinely ignored. In some circumstances they have been generously accommodated. To cite the most important example, mother-tongue schooling has been more widely available for immigrant children in the United States over the past 30 years than in most other countries. Bilingual education became well established despite the absence of any legal entitlement and despite the perennial controversies it has generated. To understand this paradox, some historical background is necessary.

III. Language Rights, American Style

To the extent that language rights can be said to exist in the U.S. legal system, they differ in two important respects from language rights in most other nations. First, they are defined almost entirely as components of *other* civil rights or civil liberties, such as the right of employees to freedom from discrimination on the basis of national origin, the right of voters to cast an informed ballot or the right of criminal defendants to understand and participate in trial proceedings. Second, like virtually all civil rights and civil liberties in Anglo-American jurisprudence, language rights are vested in individuals and not in groups.

These traditions can be traced to the Revolutionary era and to the novel concepts of national identity that it inspired. Early Americans came to see themselves as united more by allegiance to democratic ideals and personal freedoms than by a common ancestry, culture,

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[10] Idaho became the 25th in 2007. The current total of Official English laws does not include an Alaska measure struck down in court, nor Hawaii's constitutional amendment declaring the state officially bilingual in English and Native Hawaiian. For a detailed catalog of these laws, see <http://ourworld.compuserve.com/homepages/jwcrawford/langleg.htm>.

[11] *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998).

religion or language. In the words of Thomas Paine, writing in 1776, the United States would become an "asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe" (his emphasis).[12] While individuals of all nations were welcome to join in the American experiment,[13] no particular group would be favoured or disfavoured. Congress rejected overtures by European settler societies seeking to establish colonies on U.S. soil for certain nationalities.[14] "There is one principle which pervades all the institutions of this country," Secretary of State John Quincy Adams wrote in response to one of these petitions in 1819. "This is a land, not of privileges, but of equal rights. . . . Privileges granted to one denomination of people, can very seldom be discriminated from erosions of the rights of others."[15]

Some of the nation's founders, including Jefferson, Hamilton and Jay, expressed concerns that if non-anglophone groups settled in enclaves they would fail to assimilate into English-dominant society.[16] This was hardly a groundless fear, considering the diversity of the new nation. German Americans alone accounted for 8.6 per cent of the population in the first census of the United States.[17] Yet libertarian principles prevailed. No official steps were taken to prevent the formation of ethnic communities, nor were such enclaves encouraged through special entitlements. Leery of setting a precedent, in 1795 the House of Representatives rejected a petition by Germans in rural Virginia for the publication of federal laws in the German language.[18] Similar proposals were introduced in 1810, 1843 and 1862, with identical results.[19]

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12 T. Paine, *Common Sense* (Philadelphia: W. and T. Bradford, 1776), at 11.

13 Provided they were "free white persons". This requirement for naturalization, adopted in 1790, was finally eliminated in the 1940s when the last non-white group, Asians, became eligible for citizenship: E. Cose, *A Nation of Strangers: Prejudice, Politics, and the Populating of America* (New York: William Morrow, 1992).

14 M.L. Hansen, *The Atlantic Migration, 1607-1860* (New York: Harper Torchbooks, 1961).

15 Letter from J.Q. Adams to Morris de Furstenwaether, (4 June 1819) in (1820) 18 Niles Weekly Register, at 157.

16 R.B. Morris, *The Forging of the Union, 1781-1789* (New York: Harper & Row, 1987).

17 American Council of Learned Societies, "Report of the Committee on Linguistic and National Stocks in the Population of the United States" in *Annual Report of the American Historical Association for the Year 1931* (New York, American Historical Association, 1932).

18 U.S., *American State Papers: Miscellaneous*, vol. 1, no. 59 (Washington: Gales and Seaton, 1832-1861), at 114.

19 D. Baron, *The English-Only Question: An Official Language for Americans?* (New Haven: Yale University Press, 1990).

Prior to 1787, by contrast, the Continental Congress had printed its journals and other documents in German and French, hoping to curry support for the Revolution among important language-minority groups.[20] Numerous state governments continued the tradition during the 19th century. According to an extensive survey of such practices by Heinz Kloss, laws, legal notices and governors' messages appeared in various languages, including German, French, Spanish, Welsh, Czech and Norwegian.[21] Parents had a legal right to petition for German-language instruction in Ohio beginning in 1839, and a dozen other states adopted similar measures. After 1845, members of the Louisiana legislature were entitled to address their colleagues in French as well as (or instead of) English. For the most part, however, these were occasional accommodations rather than permanent guarantees to ethnic communities. Kloss's term for such practices, "promotion-oriented nationality rights", is therefore difficult to justify.[22] Nowhere is there evidence of any legislative intent to create a right to perpetuate minority-language communities; that remains true today.[23]

Territorial expansion, which increased the country's linguistic and cultural diversity, sometimes led to conflicts over language. After the Louisiana Purchase of 1803, President Jefferson's uneasiness about assimilating the francophone majority there led him to appoint a territorial governor who spoke no French and who imposed an English-only regime in New Orleans. This policy provoked outrage among residents, who responded in 1804 with a formal protest known as the "Louisiana Remonstrance", arguing that democratic government was impossible when conducted in a language that the governed could not understand: "That free communication so necessary to give the magistrate a knowledge of the people, and to inspire them with confidence in his administration, is by this means totally cut off."[24] Jefferson quickly recognized his political blunder and rescinded the English-only policy. Nevertheless, when Louisiana joined the union in

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[20] S.B. Heath, "A National Language Academy? Debate in the New Nation" (1990) 11 International Journal of the Sociology of Language 9.

[21] H. Kloss, *The American Bilingual Tradition* (McHenry, IL: Center for Applied Linguistics and Delta Systems, 1998).

[22] H. Kloss, *The American Bilingual Tradition* (McHenry, IL: Center for Applied Linguistics and Delta Systems, 1998), at 99.

[23] The one arguable exception involves the *Native American Languages Act*, 25 U.S.C. § 2901, discussed below.

[24] U.S., *American State Papers: Miscellaneous*, vol. 1, no. 183 (Washington: Gales and Seaton, 1832-1861), at 399.

1812 — the first and last state to do so with an English-speaking minority — Congress insisted that it maintain all official records in the language "in which the Constitution of the United States is written".[25]

IV. RESTRICTIONIST POLICIES

The Mexican-American War posed language-rights questions on a much larger scale. In the Treaty of Guadalupe Hidalgo of 1848, Mexico ceded not only half of its territory but about 75,000 of its citizens to the United States. While Spanish speakers were thereby guaranteed "the free enjoyment of their liberty and property", nothing specific was said about their language. Nevertheless, many believed that the treaty guaranteed them the same rights and privileges they had enjoyed under Mexican rule, including the rights to maintain Spanish and use it in communicating with government. Californians included provisions in their 1849 constitution requiring that all laws be published in Spanish.[26] When the constitution was rewritten in 1878-79, during a period of virulent nativism,[27] it imposed an English-only requirement for state documents and proceedings. Opponents argued that the provision would violate the 1848 treaty and obstruct the operation of courts in southern California, which remained largely Spanish-speaking,[28] but to no avail. The tyranny of the majority proved easy to impose on a conquered people.

Language restrictionist policies were soon adopted toward other vanquished groups. Most draconian was a project of "civilizing" American Indians, in which cultural genocide played a leading role. The

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[25] L.W. Newton, *The Americanization of French Louisiana: A Study of the Process of Adjustment between the French and the Anglo-American Populations of Louisiana, 1803-1860* (New York: Arno Press, 1980), at 86. Still, this was hardly an "English-only" requirement, as certain advocates of Official English legislation have claimed. Louisiana's government continued to operate bilingually to varying degrees until the early 20th century. The state's second governor, Jacques Villeré, never learned to speak English: S.L. Villeré, *Jacques Philippe Villeré: First Native-Born Governor of Louisiana, 1816-1820* (New Orleans: Historic New Orleans Collection, 1981).

[26] H. Kloss, *The American Bilingual Tradition* (McHenry, IL: Center for Applied Linguistics and Delta Systems, 1998).

[27] Chinese immigrants were the prime target, but racism was also directed at Spanish speakers. One delegate summed up the prevailing mood when he declared: "This State should be a State for white men. . . . We want no other race here": E. Sandmeyer, *The Anti-Chinese Movement in California* (Urbana: University of Illinois Press, 1973), at 70. Latin American immigrants were generally considered non-white.

[28] *Debates and Proceedings of the Constitutional Convention of the State of California, 1878-1879*, vol. 2 (Sacramento: Superintendent of State Printing, 1880-1881), at 801-802.

Indian Peace Commission of 1868, which recommended strategies on how to pacify tribes on the Great Plains, concluded:

> In the difference of language to-day lies two-thirds of our trouble. . . . Through sameness of language is produced sameness of sentiment, and thought. . . . Schools should be established, which children should be required to attend; their barbarous dialects should be blotted out and the English language substituted.[29]

By the 1880s, large numbers of Indian children were being forced into all-English schools that imposed severe punishments for students caught speaking their ancestral tongues.[30] Such policies persisted, officially or unofficially, until the 1960s.[31] Coercive measures were also taken to assimilate Puerto Ricans, Hawaiians and Filipinos, including English-only instruction laws in colonial schools.[32]

Language policies toward European immigrants, especially the five million Germans who arrived during the 19th century,[33] were generally more tolerant — a reflection of the political influence these groups enjoyed. In areas where their numbers were significant, such as the rural Midwest, government was often responsive to their needs. Where language minorities represented local majorities, they naturally set local language policies. For example, the first public schools in the state of Texas, established at New Braunfels in the 1850s, were taught primarily in German. In 1888, Missouri's state supervisor of public education reported that "American families" had trouble finding English-language schooling in "a large number of districts" where German predominated.[34]

Naturally, political conditions differed by state and municipality. In the 1880s a number of school systems, including those in St. Louis, Louisville and St. Paul, downgraded German from a medium of

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[29] *Report of the Commissioner of Indian Affairs* (Washington, DC: Government Printing Office, 1887), at xxi.

[30] F.P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman: University of Oklahoma Press, 1976).

[31] J. Crawford, *Educating English Learners: Language Diversity in the Classroom* (Los Angeles: Bilingual Educational Services, 2004).

[32] A.H. Leibowitz, "English Literacy: Legal Sanction for Discrimination" (1969) 45 Notre Dame Lawyer 7.

[33] Census Bureau, *Historical Statistics of the United States, Colonial Times to 1970* (Washington, DC: Government Printing Office, 1975).

[34] H. Kloss, *The American Bilingual Tradition* (McHenry, IL: Center for Applied Linguistics and Delta Systems, 1998), at 110.

instruction to a subject of foreign-language study.[35] In 1889, Wisconsin and Illinois went further, mandating English as the sole language of instruction in both public and parochial schools. German Catholics and Lutherans reacted angrily in the next election, voting most Republicans out of office and replacing them with Democrats who promptly repealed the restrictive language measures.[36] The trend toward English-only school laws continued, however, with most states effectively banning bilingual and vernacular instruction by the end of the First World War.[37]

V. AMERICANIZING THE IMMIGRANT

Around the turn of the 20th century, anxieties about the pace of assimilation began to increase. Linguistic minorities were becoming more diverse, with large numbers now coming from southern and eastern Europe, and more noticeable, as they settled primarily in urban areas. A government report on their impact concluded that many of the so-called "new immigrants" were "backward" — with "little incentive to learn the English language, become acquainted with American institutions, or adopt American standards" — as compared with the Germans and Scandinavians who had preceded them.[38]

A campaign to "Americanize the immigrant" soon won the support of large employers and the U.S. Bureau of Education, which promoted heavy-handed and sometimes coercive tactics to promote assimilation. For example, Henry Ford required his foreign-born employees to attend classes in English and "free enterprise" values.[39] A number of states followed Ford's lead, making English instruction a condition of employment for immigrant workers.[40] Frances Kellor, a leader of the Americanization movement, was candid in explaining its goals:

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[35] H. Kloss, *The American Bilingual Tradition* (McHenry, IL: Center for Applied Linguistics and Delta Systems, 1998).

[36] L.P. Kellogg, "The Bennett Law in Wisconsin" (1918) 2 Wisconsin Magazine of History 3-25; D.W. Kucera, *Church-State Relationships in Education in Illinois* (Washington, DC: Catholic University of America Press, 1955).

[37] E.G. Hartmann, *The Movement to Americanize the Immigrant* (New York: Columbia University Press, 1948).

[38] Immigration Commission, *Brief Statement of the Immigration Commission, with Conclusions and Recommendations and Views of the Minority*, vol. 1 (Washington, DC: Government Printing Office, 1911), at 42.

[39] J. Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925*, 2d ed. (New Brunswick, NJ: Rutgers University Press, 1988).

[40] E.G. Hartmann, *The Movement to Americanize the Immigrant* (New York: Columbia University Press, 1948).

> Strikes and plots that have been fostered and developed by un-American agitators and foreign propaganda are not easily carried on among men who have acquired, with the English language and citizenship, an understanding of American industrial standards and an American point of view.[41]

U.S. entry into the First World War intensified the public paranoia about minority-language speakers. Suddenly Americans were facing a foreign enemy whose language was widely spoken among them. The flames of xenophobia were fanned by politicians such as former President Theodore Roosevelt, who in 1915 denounced "hyphenated Americanism", a pointed reference to persons of German origin, who had been especially successful in perpetuating their culture in America.[42] While calling for an expansion of state-supported English classes, Roosevelt advocated the deportation of immigrants who failed to learn English within five years of arrival.[43]

Speaking the German language was soon linked to divided loyalties and even to subversive activities against the United States. By 1918, it was banned by state and local decrees throughout the Midwest — in public meetings, streetcars, schools and churches.[44] Findlay, Ohio, assessed fines of $25 for speaking German on the street.[45] Iowa farm wives were arrested for engaging in German conversations on the telephone.[46] Hall County, Nebraska, shut down a German-American newspaper and required that "the use of the German language in public and private conversation ... be discontinued."[47] Over the next three years, more than 18,000 persons were charged under such laws.[48]

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41 F. Kellor, "Americanization by Industry" (1916) 2 Immigrants in America Review 24.

42 T. Roosevelt, *Works*, Memorial ed., vol. 20 (New York: Charles Scribner's Sons, 1926), at 456.

43 T. Roosevelt, *Works*, Memorial ed., vol. 21 (New York: Charles Scribner's Sons, 1926), at 54.

44 T.G. Wiley, "The Imposition of World War I Era English-Only Policies and the Fate of German in North America" in T. Ricento & B. Burnaby, eds., *Language and Politics in the U.S. and Canada: Myths and Realities* (Mahwah, NJ: Lawrence Erlbaum Associates, 1998).

45 C. Wittke, *German-Americans and the World War: With Special Emphasis on Ohio's German-Language Press* (Columbus: Ohio State Archaeological and Historical Society, 1936).

46 S.J. Frese, "Divided by a Common Language: The Babel Proclamation and Its Influence in Iowa History" online: Society for History Education <http://www.historycooperative.org/journals/ht/39.1/frese.html>.

47 F.C. Luebke, "Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923" in P. Schach, ed., *Languages in Conflict: Linguistic Acculturation on the Great Plains* (Lincoln: University of Nebraska Press, 1980).

48 L.J. Rippley, *The German Americans* (Boston: Twayne Publishers, 1976).

Public burnings of German-language schoolbooks occurred in numerous locations, sometimes with the participation of local authorities.[49] The study of German as a foreign language was curtailed in most cities, including New York and Washington, with the support of eminent Americans such as former Secretary of War Elihu Root, who wrote: "To be a strong and united nation, we must be a one-language people."[50] As a result, enrolment in German classes declined from 24 per cent of all U.S. high school students in 1915 to less than one per cent in 1922.[51] It was during this time that many states enacted laws mandating English as the medium of instruction in public and private schools; 15 did so in 1919 alone.[52]

Yet this period of xenophobic hysteria was also distinguished by a contradictory trend. In reaction to the excesses of the First World War era, courts began to set precedents protecting minority-language speakers. The constitutional principles that were developed in these cases form the legal foundation of the language rights that exist in America today.

VI. "Desirable Ends, Prohibited Means"

Nebraska, Iowa and Ohio — all with substantial German immigrant communities — were among the states that passed the most restrictive school laws targeting languages other than English. These measures prohibited foreign-language instruction before the eighth grade and applied the ban to all schools, public and private. In 1920, Robert Meyer, a religious school teacher in Hampton, Nebraska, was convicted of the crime of teaching a Bible story in German to a 10-year-old child; he was fined $25.[53] Meyer appealed the verdict, but his conviction was upheld by the Nebraska Supreme Court. The Court reasoned that, since

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49 C. Wittke, *German-Americans and the World War: With Special Emphasis on Ohio's German-Language Press* (Columbus: Ohio State Archaeological Society, 1936); F.C. Luebke, "Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923" in P. Schach, ed., *Languages in Conflict: Linguistic Acculturation on the Great Plains* (Lincoln: University of Nebraska Press, 1980).

50 "Forbid New German Classes in Schools" *New York Times* (25 May 1918), at 14.

51 D.P. Girard, "A New Look at Foreign Languages" (1954) 56 Teachers College Record 84.

52 E.G. Hartmann, *The Movement to Americanize the Immigrant* (New York: Columbia University Press, 1948).

53 F.C. Luebke, "Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923" in P. Schach, ed., *Languages in Conflict: Linguistic Acculturation on the Great Plains* (Lincoln: University of Nebraska Press, 1980).

few citizens were affected and most parents saw no need to instruct young children in a foreign language, the law imposed "a restriction of no real consequence", while advancing an important goal:

> To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was . . . to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.[54]

Meyer appealed again, and this time the U.S. Supreme Court ruled 7-2, in his favour. This was the Court's first decision involving the rights of linguistic minorities. "The desire of the [Nebraska] Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civil matters is easy to appreciate," wrote Justice James McReynolds for the Court's majority. "But this cannot be coerced with methods which conflict with the Constitution.—a desirable end cannot be promoted by prohibited means."[55]

The constitutional principle was the Due Process Clause of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[56] In *Meyer*, the court interpreted the clause more expansively than ever before in defining rights of the individual:

> The liberty thus guaranteed denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[57]

Among these rights, the court ruled, was Meyer's right to pursue his career as a foreign-language teacher and German parents' right to engage him to teach their children. At the same time, the decision contained nothing to prohibit states from designating English as the

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54 *Meyer v. Nebraska*, 187 N.W. 100 (1922), at 102.

55 *Meyer v. Nebraska*, 262 U.S. 390 (1923), at 401-402. The court simultaneously invalidated the Iowa and Ohio laws in *Bartels v. Iowa*, 191 Iowa 1060, revd 262 U.S. 404 (1923), and *Pohl v. Ohio*, 102 Ohio St. 474 (1923), revd 262 U.S. 404 (1923).

56 U.S. Const. amend XIV, § 1.

57 *Meyer v. Nebraska*, 262 U.S. 390 (1923), at 399.

basic medium of instruction.[58] They were simply forbidden to impose arbitrary bans on foreign-language study.

This legal doctrine, known as "substantive due process", soon became a handy tool for the Supreme Court in minority-rights decisions. These included *Yu Cong Eng v. Trinidad*,[59] which struck down a law in the Philippines (then a U.S. territory) that banned the keeping of business records in Chinese, and *Farrington v. Tokushige*,[60] which prohibited Hawaii from restricting the operation of private Japanese-language schools.

Yet the doctrine has come under criticism as an invitation to "judicial activism", essentially allowing judges to impose their own social views under cover of vague legal reasoning. Conservatives such as Robert Bork, whose nomination to the U.S. Supreme Court was rejected because he was perceived as hostile to individual liberties, have taken the lead in espousing this view.[61] But substantive due process has not always favoured the rights of the downtrodden; in other cases it was invoked to block business regulations designed to protect workers and consumers. When it comes to defining and defending the rights of minority groups, another clause of the Fourteenth Amendment has become far more important: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[62]

VII. EQUAL PROTECTION CLAUSE

While the best-known precedent on equal protection is *Brown v. Board of Education*,[63] outlawing the racial segregation of African American students in public schools, the Supreme Court has also applied the principle to prohibit discrimination on the basis of national origin. In *Hernandez v. Texas*,[64] for example, it overturned a murder

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58 "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy": *Meyer v. Nebraska*, 262 U.S. 390 (1923), at 402.

59 271 U.S. 500 (1926).

60 273 U.S. 284 (1927).

61 U.S., *Nomination of Robert Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong. (1987).

62 U.S. Const. amend. XIV, § 1.

63 347 U.S. 483 (1954).

64 347 U.S. 475 (1954).

conviction because Mexican Americans had been systematically excluded from the jury.

Generally, U.S. courts have given legislatures considerable discretion in differentiating among classes of persons, provided that laws have a rational basis and advance a legitimate public purpose. But when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon" to safeguard minority rights, the Supreme Court has concluded that "more exacting judicial scrutiny" is warranted.[65] When "suspect classes" are involved — those defined by race or ethnicity — state actions must be "precisely tailored to serve a compelling governmental interest".[66] In other words, members of these groups may not be subjected to disparate treatment in order to advance a public purpose that is trivial or that could be achieved by less drastic means.

Language-based discrimination has sometimes been treated as a form of national origin discrimination. In 1986, a federal appeals court ruled that a local prosecutor had violated the Equal Protection Clause by conducting an investigation of voter fraud that arbitrarily singled out Spanish- and Chinese-speaking citizens who had requested bilingual ballots in the previous election.[67] But the Supreme Court has yet to define language background in itself as a suspect class[68] or even necessarily as a proxy for national origin. In *Hernandez v. New York*,[69] it upheld as "race neutral" the exclusion of Spanish speakers from a jury because the prosecutor warned that bilingual jurors might have difficulty treating the interpreter's English version of testimony as the official trial record. Justice Anthony Kennedy added a note of caution, however:

> This decision does not imply that exclusion of bilinguals from jury service is wise, or even constitutional in all cases. It may be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[70]

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65 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at 152.

66 *Plyler v. Doe*, 457 U.S. 202 (1982), at 202.

67 *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986); vacated as moot, 108 S.Ct. 52 (1987).

68 "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States" (1987) 100 Harv. L. Rev. 1345.

69 500 U.S. 352 (1991).

70 *Hernandez v. New York*, 500 U.S. 352 (1991), at 354.

A precedent clarifying the extent to which the Equal Protection Clause applies to linguistic minorities has yet to be established. The Supreme Court turned down its first opportunity to do so, dismissing a challenge to an English-only ballot measure in Arizona on procedural grounds.[71] But if language restrictionist laws continue to spread, ultimately the court may be forced to rule on the constitutionality of such measures (see below).

VIII. STATUTORY PROTECTIONS

Most legal guarantees for linguistic minorities today stem from the *Civil Rights Act of 1964*,[72] especially Title VI, which prohibits discrimination on the basis of race, sex or national origin in the expenditure of federal funds. As such, the law applies to every state and local government and almost every public school in the country. Concerned about the lack of attention to the academic needs of limited-English-proficient students, in 1970 the U.S. Department of Health, Education, and Welfare issued a memorandum advising local districts with significant enrolments of "national origin-minority group children" about their obligations in this area. Among other things, it noted:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, *the district must take affirmative steps to rectify the language deficiency* in order to open its instructional program to these students.[73] (emphasis added)

Few local authorities paid much attention to this interpretation of Title VI until it was upheld in *Lau v. Nichols*,[74] the Supreme Court's most consequential language-rights decision to date. The defendant in this case, the San Francisco school district, took the position that if some children enrolled without the English skills needed for academic success, that was unfortunate but it was not the responsibility of the

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71 *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

72 42 U.S.C. § 2000a.

73 Memorandum from J. Stanley Pottinger, Director, Office for Civil Rights to School Districts With More Than Five Percent National Origin-Minority Group Children, *DHEW Memo Regarding Language Minority Children* (25 May 1970) online: Department of Health, Education, and Welfare, Office of the Secretary <http://www.ed.gov/about/offices/list/ocr/docs/lau1970.html> at 1.

74 414 U.S. 563 (1974).

schools. The school district's attorneys argued that, by offering the same education to Chinese-dominant children that all other students received — in English — San Francisco was not discriminating. The Supreme Court disagreed. In so doing, it established a new civil-rights principle with special relevance for limited-English speakers: *To provide an equal opportunity, in certain cases it may be necessary to accommodate differing needs.* According to the Court's unanimous ruling,

> there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[75]

In reaching this judgment, the Court relied on the *Civil Rights Act of 1964*[76] and "did not reach" the constitutional arguments that the plaintiffs had raised. It also stopped short of ordering the district to adopt bilingual education for its English language learners:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the board of education be directed to apply its expertise to the problem and rectify the situation.[77]

As a practical matter, San Francisco chose to make bilingual education programs widely available for its Chinese- and Spanish-speaking students. But the court's reluctance to mandate any particular instructional approach has had far-reaching implications. The federal Office for Civil Rights initially proceeded as if bilingual education were now required. From 1975 to 1980, operating under a set of hastily drafted guidelines known as the Lau Remedies, federal civil-rights authorities negotiated agreements with 359 school districts that had been neglecting English learners — primarily in the Southwest — to offer

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75 *Lau v. Nichols*, 414 U.S. 563 (1974), at 566.

76 42 U.S.C. § 2000a.

77 *Lau v. Nichols*, 414 U.S. 563 (1974), at 565.

programs featuring native-language instruction.[78] English-as-a-second-language classes alone were deemed to be insufficient. This informal mandate, albeit short-lived, resulted in a substantial growth in the number of native-language programs. Bilingual education won acceptance in many districts that, in all likelihood, would never have tried it without being forced to do so. But federal pressure was short-lived. In 1981, one of Ronald Reagan's first acts as president was to rescind the policy. Since that time there has been no federal mandate for bilingual education.[79]

On the other hand, several states have required schools to offer bilingual programs under certain circumstances — generally when there is a "critical mass" of English learners of the same age and native-language background. Eleven states enacted such laws during the 1970s,[80] but some have since been repealed. Between 1998 and 2002, voters in California,[81] Arizona,[82] and Massachusetts[83] adopted English-only school initiatives. By 2006, there were just seven states with bilingual-education requirements.[84]

It is important to note, however, that none of these state statutes has created an *entitlement* to bilingual instruction for language-minority students. Moreover, courts have generally declined to recognize such a guarantee on constitutional grounds. In a typical decision, *Guadalupe Organization Inc. v. Tempe Elementary School District*,[85] one federal appeals court endorsed the laissez-faire tradition on language that has often prevailed in the United States:

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78 M. Jiménez, "The Educational Rights of Language-Minority Children" in J. Crawford, ed., *Language Loyalties: A Source Book on the Official English Controversy* (Chicago: University of Chicago Press, 1992).

79 Between 1974 and 2002, the *Bilingual Education Act* required a percentage of federal grant recipients to use their funding to offer native-language programs: Pub. L. No. 93-380; Pub. L. No. 95-561; Pub. L. No. 98-511; Pub. L. No. 100-297; Pub. L. No. 103-382. The law that superseded it, the *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, features no such requirements; J. Crawford, *Educating English Learners: Language Diversity in the Classroom* (Los Angeles: Bilingual Educations Services, 2004).

80 T.C. Gray, H.S. Convery & K.M. Fox, *The Current Status of Bilingual Education Legislation* (Washington, DC: Center for Applied Linguistics, 1981).

81 Cal. Educ. Code § 300.

82 Ariz. Rev. Statutes § 15-752.

83 Mass. G.L. c. 71A.

84 J. Crawford, *Educating English Learners: Language Diversity in the Classroom* (Los Angeles: Bilingual Educations Services, 2004).

85 587 F.2d 1022 (9th Cir. 1978).

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures, cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.[86]

Elsewhere, a different federal appeals court asserted a "right to bilingual education" under Title VI of the *Civil Rights Act of 1964*,[87] but its ruling affected only a single town in New Mexico.[88] In Texas, a U.S. district judge mandated a statewide bilingual education program on similar grounds, citing the state's long-standing failure to provide effective schooling for Mexican American children;[89] his order was reversed on appeal. In 1998, after California voters adopted *Proposition 227*,[90] a ballot measure requiring all-English "immersion" programs for most English language learners, a federal court refused to block the new law. This decision, in *Valeria G. v. Wilson*, cited the *Guadalupe*[91] precedent that "there is no constitutional right to bilingual education."[92]

IX. "Appropriate Action"

Nevertheless, guarantees of a meaningful education for English language learners remain substantial — at least in theory. They flow primarily from three sources: (1) *Lau v. Nichols*;[93] (2) the *Equal Educational Opportunities Act of 1974* (EEOA),[94] which "codified" *Lau*'s requirement that schools must "take appropriate action to overcome language barriers that impede equal participation by its

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86 *Guadalupe Organization Inc. v. Tempe Elementary School District*, 587 F.2d 1022 (9th Cir. 1978), at 1027-1028.

87 42 U.S.C. § 2000a.

88 *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974).

89 *United States v. Texas*, 506 F.Supp. 405 (E.D. Tex. 1981); revd 680 F.2d 356 (5th Cir 1982).

90 Cal. Educ. Code § 300.

91 *Guadalupe Organization Inc. v. Tempe Elementary School District*, 587 F.2d 1022 (9th Cir. 1978).

92 12 F.Supp.2d 1007 (1998), at 1023.

93 414 U.S. 563 (1974).

94 20 U.S.C. § 1701.

students in its instructional programs";[95] and (3) *Castañeda v. Pickard*,[96] a federal court ruling that created standards for measuring compliance.

The EEOA turned out to be significant because the Supreme Court has narrowed the reach of the *Civil Rights Act of 1964*.[97] Expressing "serious doubts" about the *Lau* decision,[98] which found a "racially disproportionate impact" in itself to be illegal, the Court now insists that Title VI was only meant to outlaw *intentional* discrimination.[99] Obviously, intentional discrimination is much harder to prove than a disproportionate impact. So parents suing to improve schooling for language-minority students have relied heavily on the EEOA, which endorses the basic principles of *Lau*: that English learners are entitled to *some kind of special program*, whether or not they have been consciously victimized in the past. Such programs need not be bilingual, but they must be effective in helping children overcome language barriers that obstruct their equal access to the curriculum.

How can it be determined whether schools are meeting their obligations? *Castañeda v. Pickard*[100] established a "three-prong" test to answer this question that has been adopted by federal courts and civil rights agencies.[101] It can be summarized as follows:

- Instructional programs must be based on an educational theory recognized as sound by experts.
- Resources, personnel and practices must be reasonably calculated to implement the educational approach effectively.
- Programs must be evaluated and restructured, if necessary, to ensure that language barriers are being overcome.

Castañeda v. Pickard[102] has thereby prompted many school officials to improve English learner programs, whether bilingual or all-English. In particular cases (*e.g.*, *Keyes v. School District No. 1*[103]), the test has

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95 20 U.S.C. § 1703(f).

96 648 F.2d 989 (5th Cir. 1981).

97 42 U.S.C. §2000a.

98 *Lau v. Nichols*, 414 U.S. 563 (1974).

99 *University of California Regents v. Bakke*, 438 U.S. 265 (1978), at 352.

100 648 F.2d 989 (5th Cir. 1981).

101 Strictly speaking, *Castañeda* is a binding precedent only in the 5th Federal Circuit, where the case was decided, but the three-prong test has become a widely recognized tool. In 1986, it was formally adopted by the Office for Civil Rights in the U.S. Department of Education.

102 648 F.2d 989 (5th Cir. 1981).

103 576 F.Supp. 1503 (D. Colo. 1983).

led to court orders for bilingual instruction to remedy civil-rights violations. But with the growing conservatism of the federal judiciary since 1980, courts have increasingly rejected arguments that native-language approaches are more appropriate for these students (*e.g.*, *Teresa P. v. Berkeley Unified School District*[104]). Plaintiffs have also been unsuccessful in using the test to challenge the legality of English-only school measures (*e.g.*, *Valeria G. v. Wilson*).[105] Nevertheless, over the long term, *Castañeda* has the potential to support more extensive guarantees for language-minority students.

Court rulings never take place in a political vacuum. The rather chilly climate for language rights in education has been influenced in recent years by an increase in anti-immigrant attitudes and a decline in advocacy by ethnic interest groups. The National Council of La Raza, for example, the nation's largest Hispanic lobby, has effectively abandoned its advocacy for bilingual education. It now relies on the *No Child Left Behind Act of 2001*,[106] a punitive accountability system based on standardized test scores, to force schools to provide more "attention" for English learners.[107] That strategy has yet to bear fruit. In its first four years, the law has done nothing to narrow the "achievement gap" between white and Latino students.[108]

The *No Child Left Behind Act*[109] effectively repealed the *Bilingual Education Act* of 1968,[110] renaming it the *English Proficiency Act* and expunging all references to "bilingual" or "bilingualism". Although the new law does not prohibit native-language instruction, it requires children who are limited in English to take achievement tests that are mostly administered in English and on which "high stakes" decisions are made about schools (*e.g.*, educators can lose their jobs because of low scores). This system creates short-term incentives to restrict teaching to English only, even though a substantial body of research has

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104 724 F.Supp. 698 (N.D. Cal. 1989).

105 12 F.Supp. 2d 1007 (1998).

106 Pub. L. No. 107-110.

107 M. Lazarín, *Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act* (Washington, DC: National Council of La Raza, 2006).

108 J. Lee, *Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps: An In-Depth Look into National and State Reading and Math Outcome Trends* (Cambridge, MA: Harvard Civil Rights Project, 2006).

109 Pub. L. No. 107-110.

110 Pub. L. No. 90-247.

proven bilingual education to be more effective over the long term.[111] *No Child Left Behind* would seem to be working at cross purposes with *Castañeda v. Pickard*,[112] an argument that may ultimately be tested in the courtroom.

Meanwhile, the availability of bilingual education is rapidly declining. A national survey reported that, in 1992, 37 per cent of English learners were enrolled in classrooms with "significant" use of native-language instruction; by 2002, the figure was 17 per cent.[113] Further decline is evident under the high-stakes-testing regime inaugurated by the *No Child Left Behind Act*[114] in 2002. It seems likely to continue unless current laws are rewritten.

X. "LOOSE ENDS"

The status of language rights in fields other than education is equally inconsistent, contradictory and confusing. As one legal scholar explains, "there is no clearly defined 'right to language' in the United States. It is as though the threads have not been woven into the fabric of the law, but rather surface as bothersome loose ends to be plucked when convenient."[115] While constitutional principles — especially the Equal Protection Clause — do provide an important safety net, statutory interpretations leave some gaping holes. What follows is a brief survey of U.S. law in major areas of concern for minority-language speakers.

1. Civil Liberties

Language differences can naturally pose an obstacle to exercising fundamental rights that citizens of liberal democracies take for granted. One example is the right of criminal defendants to face their accusers and participate fully in trial proceedings. These basic protections are guaranteed by the U.S. Constitution, but before the 1970s they were often denied to limited-English speakers. A case that highlighted this

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111 See, *e.g.*, S. Krashen & G. McField, "What Works? Reviewing the Latest Evidence on Bilingual Education" (Nov./Dec. 2005) 1 Language Learner 7.

112 648 F.2d 989 (5th Cir. 1981).

113 A.M. Zehler *et al.*, *Descriptive Study of Services to LEP Students and to LEP Students with Disabilities* (Arlington, VA: Development Associates, 2003).

114 Pub. L. No. 107-110.

115 B. Piatt, "Toward Domestic Recognition of a Human Right to Language" (1986) 23 Hous. L. Rev. 885, at 885.

situation involved a Puerto Rican labourer who was charged with a killing committed during a drunken brawl in New York. The defendant, a monolingual Spanish speaker, was unable to communicate with his court-appointed lawyer, a monolingual English speaker. Thus he had little idea of the evidence presented against him. After a four-day trial, Rogelio Negron was convicted of second-degree murder and served three years in prison until the verdict was invalidated.[116] The Court that overturned his conviction, ordering a retrial, was harshly critical of his treatment:

> Not only for the sake of effective cross-examination but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy. . . . The least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to a competent translator to assist him, at state expense if need be, throughout his trial.[117]

This decision inspired the federal *Court Interpreters Act* (1978),[118] a law that addresses the needs of limited-English speakers by establishing a program to train and provide interpreters. Yet it applies only in legal actions initiated by the U.S. government, leaving state courts to set their own policies and excluding most civil litigation. The latter cases include divorce and child custody proceedings, which often have major stakes for the individuals involved. Trial judges, who are generally untrained in language assessment, retain considerable leeway to determine which defendants are entitled to interpreters and which interpreters are competent to provide services.[119]

2. Elections

The *Voting Rights Act of 1965*,[120] which primarily addressed the disfranchisement of African-Americans in the South, was expanded in

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116 *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970).

117 *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), at 390-91.

118 28 U.S.C. § 1827.

119 B. Piatt, *¿Only English? Law and Language Policy in the United States* (Albuquerque: University of New Mexico Press, 1990).

120 42 U.S.C. § 1973.

1975 to address the situation of linguistic minorities. Whereas the former had been barred from voting by "literacy" tests applied unfairly,[121] the latter faced a lesser but still significant barrier: English-only elections. As a remedy, Congress mandated bilingual voting rights under certain circumstances. Jurisdictions that include substantial populations of citizens who speak a language other than English (currently at least 10,000 persons or 5 per cent of registered voters) and who have low rates of English literacy must provide ballots, written "voting materials" and oral assistance to voters in that language. Initially the main beneficiaries were Mexican Americans in the Southwest, Puerto Ricans in the Northeast, Chinese Americans on the West Coast and Native Americans on a few reservations. In 1992, coverage was expanded to nearly 500 localities in 31 states; Alaska, Arizona, California, New Mexico and Texas must now provide bilingual assistance statewide.[122] The result has been to increase electoral participation substantially among these groups.[123]

Bilingual voting rights have been a frequent target of criticism by Official English advocates. Since an ability to speak and read English is required for naturalization as a U.S. citizen, the critics maintain that English-only ballots should be sufficient.[124] Why go to the trouble and expense of translating voting materials, they ask, when learning English is a duty of citizenship? There are two problems with this argument. First, the literacy test is waived for persons who are more than 50 years of age and have been legal residents of the United States for at least 20 years. Second, the level of literacy required for naturalization is quite low[125] — inadequate to understand complex ballot measures that voters must consider in many states.[126]

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[121] African Americans who attempted to register to vote were often required to interpret complex legal documents to the satisfaction of local officials. Thus in some majority-black counties, hardly a single black voter was registered. Meanwhile, barely literate whites were registered without taking such tests: J. Lewis, *Walking with the Wind: A Memoir of the Movement* (New York: Simon & Schuster, 1998).

[122] 67 Fed. Reg. 48871 (2002).

[123] "Yes on Bilingual Ballots" *Washington Post* (10 July 2006), at A16.

[124] See, *e.g.*, S.I. Hayakawa, *One Nation . . . Indivisible?* (Washington, DC: U.S. English, 1985).

[125] In one year only 29 out of 201,507 petitions for naturalization were denied because of limited English proficiency: Immigration and Naturalization Service, *Statistical Yearbook* (Washington, DC: Immigration and Naturalization Service, 1982).

[126] J. Trasviña, "Bilingual Ballots: Their History and a Look Forward" in J. Crawford, ed., *Language Loyalties: A Source Book on the Official English Controversy* (Chicago: University of Chicago Press, 1992).

The most intense opposition, however, has focused on political rather than practical considerations. In 2006, as Congress debated the future of bilingual voting rights, Representative Dana Rohrabacher, a California Republican, argued that "in every other country in the world where . . . they have actually promoted bilingualism, it has led to balkanization of countries and hatred between peoples." He called on fellow legislators to "[v]ote against bilingualism".[127] In the end, Congress ignored his plea and chose instead to extend the law for another 25 years.

3. Employment

Since the acceleration of immigration in the 1970s, "speak English only" rules in the workplace have been among the most litigated language-rights issues, leading to numerous and sometimes contradictory court rulings. Such bans on private speech in minority languages have been upheld in some areas and outlawed in others. In a Texas case, the Fifth U.S. Circuit Court of Appeals found it permissible to fire a store clerk for making an offhand comment in Spanish because his employer feared that English-speaking customers might object. According to this decision, no discrimination was involved because the employee was bilingual and could have easily complied with the employer's policy.[128] But the Ninth Circuit Court in California reached the opposite conclusion in *Gutierrez v. Municipal Court of Southeast Judicial District*, ruling that English-only rules — which were enforced even during workers' coffee breaks — created a hostile work environment for Latinos.[129] "The cultural identity of certain minority groups is tied to the use of their primary tongue," the court noted.

> The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin. Although the individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity. . . . Because language and accents are identifying characteristics, rules which have a negative effect on bilinguals, individuals with accents, or

127 U.S., *Cong. Rec.*, vol. 152, 86, at H4746 (28 June 2006).

128 *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

129 838 F.2d 1031 (9th Cir. 1988); vacated as moot, 490 U.S. 1016 (1989).

non-English speakers, may be mere pretexts for intentional national origin discrimination.[130]

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces the *Civil Rights Act of 1964*[131] in the private sector, sought to clarify the legal status of speak-English-only policies in a set of guidelines issued in 1983. It advised employers that language restrictions may be permissible when "necessary to safe and efficient job performance", such as in a medical operating room or during dangerous manoeuvres on an oil rig. But appeasing racial or ethnic prejudices among customers is not a legitimate example of "business necessity", according to the EEOC.[132] The agency regards blanket English-only rules as a form of illegal discrimination on the basis of national origin. In 2000, it investigated 443 such complaints throughout the country.[133]

Nevertheless, the legal status of the EEOC's guidelines remains uncertain after being rejected in *Garcia v. Spun Steak Co.*[134] A federal appeals court ruled that, even though English-only rules targeted Spanish-speaking employees, the *Civil Rights Act of 1964*[135] does not protect the expression of ethnic cultures in the workplace. Sooner or later, the Supreme Court is likely to settle the matter, although it declined to hear appeals in the *Gutierrez v. Municipal Court of Southeast Judicial District*[136] and *Spun Steak* cases.

4. Business Signs

Following the passage of California's *Proposition 63* (1986),[137] an Official English amendment to the state constitution, several municipalities passed ordinances restricting the use of other languages for commercial purposes. Most of the measures sought to discourage the

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130 *Gutierrez v. Municipal Court of Southeast Judicial District*, 838 F.2d 1031, at 1039 (9th Cir. 1988); vacated as moot, 490 U.S. 1016 (1989).

131 42 U.S.C. § 2000a.

132 *Compliance Manual* (Washington, DC: Equal Employment Opportunity Commission, 2002), at 13-V.

133 "EEOC Settles English-only Suit for $2.44 Million against University of Incarnate Word" (2001), online: Equal Employment Opportunity Commission <http://www.eeoc.gov/press/4-20-01.html>.

134 998 F.2d 1480 (9th Cir. 1993); cert. denied, 512 U.S. 1228 (1994).

135 42 U.S.C. § 2000a.

136 838 F.2d 1031 (9th Cir. 1988); vacated as moot 490 U.S. 1016 (1989).

137 Cal. Const. art. 3, § 6.

use of Asian characters on business signs. A typical ordinance in the city of Pomona required that signs displaying "foreign alphabetical characters" devote at least half their space to English translation. While the official rationale was to help in identifying buildings in case of fire or other emergencies, the city councilman who sponsored the law made his motivation clear: "I fought in two wars to keep the country the way it is, and I'll be damned if I'm going to let any part of America be turned into Little Saigon or whatever."[138]

A federal court ruled the sign restrictions unconstitutional, as a violation of the First Amendment right to freedom of speech, as well as the Equal Protection Clause because racial minorities were being singled out for harassment.[139] Nevertheless, officials in several nearby towns refused to repeal similar ordinances.[140]

5. Government Access

Minority-language speakers have filed a number of lawsuits seeking improved access to government services, but federal courts have generally declined to recognize any entitlement to bilingual accommodations. In a typical case, *Carmona v. Sheffield*,[141] demands for Spanish-language forms and assistance in collecting unemployment benefits were denied. English-only services provided by the state of California were not a matter of discrimination but of practical necessity, the court ruled.

> If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, [a mandate to provide bilingual services] would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts, and administrative agencies, would become all but impossible. The application of Federal and State

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[138] J. Miller, "Lawsuit Filed over Pomona Sign Law" *Los Angeles Times* (16 February 1989), at IX, 4.

[139] *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328 (C.D. Cal. 1989).

[140] J. Crawford, *Hold Your Tongue: Bilingualism and the Politics of "English Only"* (Reading, MA: Addison-Wesley, 1992).

[141] 325 F.Supp. 1341 (N.D. Cal. 1971); affd 475 F.2d 738 (9th Cir. 1973).

> statutes, regulations, and proceedings would be called into serious question.[142]

In a similar case, *Soberal-Perez v. Schweiker*,[143] a petition for the translation of Social Security disability forms and administrative proceedings into Spanish was also denied. The court made no allowance for the fact that the plaintiff was not an immigrant but a Puerto Rican citizen of the United States who had moved to New York and remained limited in English. It ruled that the discrimination, if any, was on the basis of language — not Hispanic origin — and "language, per se, is not a characteristic protected by the Constitution from rational differentiation."[144]

As yet, language discrimination alone does not trigger "close scrutiny" of state actions under the Equal Protection Clause, and government's failure to provide access to services for linguistic minorities does not violate the U.S. Constitution. Thus — except where Congress or state legislatures have made statutory exceptions, as in the *Equal Educational Opportunities Act of 1974*[145] mandating special help for limited-English-proficient students — there is no legal right to bilingual assistance.

XI. Official English versus the Constitution

While that interpretation remains dominant in American courts, there is nothing to prevent public officials from voluntarily providing services in languages other than English — whether by statute, policy or practice — as indeed they have on many occasions. The latest example is *Executive Order 13166* (2000), President Clinton's directive to expand access to federal government services on an as-needed basis for limited-English speakers. Except where states have adopted English-only school laws, there are no restrictions on the ability of government to offer bilingual accommodations. Official English declarations at the state level (other than those struck down by courts) have been interpreted as largely symbolic.

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142 *Carmona v. Sheffield*, 325 F.Supp. 1341, at 1342 (N.D. Cal. 1971); affd 475 F.2d 738 (9th Cir. 1973).

143 549 F.Supp. 1164 (E.D.N.Y. 1982); affd *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983).

144 *Soberal-Perez v. Schweiker*, 549 F.Supp. 1164 (E.D.N.Y. 1982); affd *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), at 1174.

145 20 U.S.C. § 1701.

The legal situation could change radically, however, with the adoption of an English-only measure at the federal level. Several such bills introduced in recent years would severely limit government operations in other languages and would expressly deny any "right to language".[146] Though less sweeping, the National Language amendment passed by the Senate in 2006 was explicitly designed to overrule Clinton's executive order.[147]

Some legal authorities have argued that the Fourteenth Amendment could provide a powerful weapon against restrictive Official English laws. Thus far, as we have seen, the federal courts have declined to apply the Equal Protection Clause in cases where minority-language speakers have demanded an affirmative right to bilingual services. Judges might be more receptive, however, in cases where limits are placed on government's discretion to provide such services and minority groups are thereby deprived of equal access.

Arguably, linguistic minorities — or limited-English speakers — should be regarded as a "suspect class" that has historically suffered discrimination and political powerlessness.[148] When laws single out a suspect class for differential treatment, courts are required to apply strict scrutiny to ensure they are not being targeted for mistreatment. As noted above, to avoid violating the Equal Protection Clause, such legislation must advance a "compelling" public purpose and employ means that are as "precisely tailored" as possible.[149] Vague and unprovable justifications for English-only restrictions would not be deemed sufficient. Senator S.I. Hayakawa, for example, co-founder of the U.S. English lobby, claimed that the United States needs "one official language and one only, so that we can unite as a nation".[150] It is very unlikely that such an argument would pass strict scrutiny.

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[146] Except for members of the English-speaking majority. An Official English bill passed in 1996 by the House of Representatives (but not the Senate) included a provision to protect English speakers from "discrimination" on the basis of language: see J. Crawford, *At War with Diversity: U.S. Language Policy in an Age of Anxiety* (Clevedon, UK: Multilingual Matters, 2000), at 38-42.

[147] U.S., *Cong. Rec.*, vol. 152, 62 at S4754 (18 May 2006).

[148] They might also be considered a "quasi-suspect class" — which the Supreme Court has applied to groupings based on sex or illegitimacy — thus triggering intermediate scrutiny for purposes of equal protection analysis: "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States" (1987) 100 Harv. L. Rev. 1345.

[149] *Plyler v. Doe*, 457 U.S. 202 (1982). In this case, the U.S. Supreme Court overturned a Texas law allowing public schools to exclude the children of undocumented immigrants. The students involved were largely Spanish speakers from Mexico.

[150] S.I. Hayakawa, *One Nation ... Indivisible?* (Washington, DC: U.S. English, 1985, at 18.

The most draconian Official English measure to date, passed by Arizona voters in 1988, was promoted precisely on those grounds. Known as *Proposition 106*, it amended Article 28 of the state constitution to require:

> This state and all political subdivisions of this state shall act in English and no other language... . This Article applies to:
>
> (i) the Legislative, Executive and Judicial branches of government;
>
> (ii) all political subdivisions, departments, agencies, organizations and instrumentalities of this State, including local governments and municipalities;
>
> (iii) all statutes, ordinances, rules, orders, programs and policies;
>
> (iv) all government officials and employees during the performance of government business.[151]

The initiative's reach was all-encompassing, with only limited exceptions to the English-only mandate.[152] Had its restrictions ever taken effect, they would have been a virtual gag order for state employees. Even elected officials would have been forbidden to address constituents in Spanish, Navajo, Hualapai, Tohono O'odham or other languages spoken in the diverse state. But a judge immediately blocked the implementation of *Proposition 106* until legal arguments could be heard.

After a decade of litigation in both state and federal courts, the initiative was struck down as a violation of the U.S. Constitution. While not addressing the question of whether non-English speakers constitute a suspect class, the Arizona Supreme Court found that Article 28 violated the Equal Protection Clause on other grounds.[153] The Court ruled that the Official English initiative "unduly burdens [the

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[151] 28 Ariz. Const. § 1-2.

[152] These included: "(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English; (b) to comply with other federal laws; (c) to teach a student a foreign language as part of a required or voluntary educational curriculum; (d) to protect public health or safety; (e) to protect the rights of criminal defendants or victims of crime": 28 Ariz. Const. § 2.

[153] In a parallel case, *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990), a federal judge ruled that Proposition 106 was an unconstitutional infringement of the freedom of speech. The decision was appealed to the U.S. Supreme Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), which declined to rule on the merits and declared the case "moot" because the plaintiff challenging English-only restrictions had resigned her job with the state of Arizona.

fundamental] rights of a specific class without materially advancing a legitimate state interest". [154]

Those "fundamental rights" involved the freedom of speech guaranteed by the First Amendment, which the Court interpreted expansively to include not only the message expressed but the linguistic medium as well. The Court found that *Proposition 106*

> effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them. Meaningful communication in those cases is barred.[155]

Besides restricting the political speech of state officials and employees, the measure restricted citizens' rights to *receive* information:

> The Amendment contravenes core principles and values undergirding the First Amendment — the right of the people to seek redress from their government. . . . By denying persons who are limited in English proficiency, or entirely lacking in it, the right to participate equally in the political process, the Amendment violates the constitutional right to participate in and have access to government, a right which is one of the "fundamental principle[s] of representative government in this country."[156]

An Official English ballot initiative adopted in 1998 was struck down on similar grounds by an Alaska court, although the decision relied less on the First Amendment than on the state constitution, which says, quite plainly: "Every person may freely speak, write, and publish on all subjects."[157] In a less-than-favourable climate for minority rights, this libertarian principle — cherished by citizens of all racial and ethnic groups — has proven be the strongest barrier to English-only legislation. The judge continued:

> Americans will put up with a lot of cacophony, viewing it not as a weakness but as a strength. This is surely no less true in Alaska. We don't inquire too much into the motives of a law restricting speech, we don't worry about whether the speaker makes sense, and we even tolerate some downright offensive language, all to make sure we don't

154 *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), at 987.
155 *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), at 997-98.
156 *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), at 997.
157 *Kritz v. State of Alaska*, Case No. 3DI-99-12 CI (2002), at 15.

> chill the exercise of our most fundamental right. The Official English Initiative violates this principle by its extremely broad sweep, and so violates Article I, section 5 of the Alaska Constitution.[158]

Measures along the lines of the Arizona and Alaska initiatives are likely to encounter similar legal hurdles in the future. Less restrictive, primarily symbolic declarations of English as the official language are not.

XII. NATIVE AMERICANS: A SPECIAL CASE?

Another issue raised in challenging the Alaska law, but not decided by the court, was whether indigenous minorities are entitled to special consideration when it comes to language. The plaintiffs in the case were officials in the Yup'ik-speaking village of Togiak, where they said local government would be very difficult to conduct in English only. Proponents of the Official English measure claimed that Alaska Natives would be exempted from its effects by the *Native American Languages Act of 1990* (NALA).[159] The law states: "It is the policy of the United States to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages." It goes on to cite "the inherent right of Indian tribes and other Native American governing bodies . . . [to use their] languages for the purpose of conducting their own business".[160]

Do Native peoples in the United States constitute an exception to the rule that language rights apply to individuals rather than to groups? That seems unlikely under NALA's provisions, although the question remains to be resolved in any formal way by the U.S. legal system.

Since the 1970s, Congress has enacted several laws providing "self-determination" — or at least a measure of autonomy in managing their own affairs — to indigenous peoples living on reservations. NALA was part of this trend. Yet the law remains vague on the status of language rights in a *non-tribal* context — in other words, in municipal governments

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158 *Kritz v. State of Alaska*, Case No. 3DI-99-12 CI (2002), at 33.

159 25 U.S.C. § 2901. English-only organizations have historically aimed their rhetorical salvos at Hispanics and Asians rather than Native Americans. While the former groups have often immigrated from elsewhere, the latter have a historical experience that weakens the case for assimilation; see J. Crawford, *Hold Your Tongue: Bilingualism and the Politics of "English Only"* (Reading, MA: Addison-Wesley, 1992).

160 25 U.S.C. § 2901. The law was amended in 1992 and 2006 to create and expand a modest grant program for these purposes.

or school districts, which come under state rather than tribal jurisdiction. When Arizonans passed an English-only school initiative, the state attorney general claimed that the law would limit its requirements to non-Indian communities.[161] But that opinion — which is all it was — did not prevent Arizona's superintendent of public instruction from extending the mandate to all public schools, where most Indian students are enrolled.[162] Thus far, the potential conflicts between NALA and English-only legislation have yet to be adjudicated.

XIII. PROSPECTS

With conservative Republican presidents appointing federal judges for 18 of the past 26 years, U.S. courts have become far less sympathetic to equal protection arguments than they were in the 1960s and 1970s. Not only are civil rights protections failing to expand, but precedents set in the earlier period — such as support for "affirmative action" to boost the representation of minorities in public universities — are increasingly being reversed by the Supreme Court.[163] Since federal judges serve lifetime appointments, this trend is unlikely to change in the near term, even if liberal Democrats were to reassert political dominance.

The implications for advocates of minority language rights are sobering. No substantial gains are likely to be won through the courts anytime soon. Efforts to expand bilingual accommodations for limited-English speakers — that is, to ensure they enjoy equal access to government — will have to rely primarily on the political process. Legislators will feel pressure from the anti-immigrant forces that are again trying to exploit fears about bilingualism. But they will also have to weigh the consequences of alienating the growing number of linguistic minority voters, Hispanics in particular.

The late Senator Hayakawa once conceded that there was no immediate threat to English in the United States. After all, immigrants are acquiring the language at unprecedented rates.[164] But he insisted that

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[161] J. Napolitano, "Re: Application of Proposition 203 to Schools Serving the Navajo Nation" (2001) Arizona Attorney General Opinion I01-006 (R00-062).

[162] B. Donovan, "AG: Public Schools not Exempt from Prop. 203" *Navajo Times* (19 February 2004), at 1.

[163] See, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[164] C. Veltman, "The American Linguistic Mosaic: Understanding Language Shift in the United States" in S.L. McKay & S.C. Wong, eds., *New Immigrants in the United States* (Cambridge: Cambridge University Press, 2000).

a constitutional English Language Amendment was needed as "an insurance policy" against the effects of demographic change. In the future it would prevent Spanish speakers from using their political clout to make the United States an officially bilingual nation.[165] He need not have worried. Even at the height of the Chicano movement of the 1970s, official status for Spanish was never on the militants' agenda, nor was any form of "linguistic separatism" that Hayakawa's organization, U.S. English, continues to warn against. Minority aspirations in this country have always focused primarily on social equality and freedom to participate in the wider society. Today's ethnic groups are no different.

This tradition helps to explain why language rights in the United States have been understood essentially as a question of civil rights, rather than as a prerogative to preserve linguistic communities. When the political strength of Hispanics and other minorities catches up with their numbers, their civil rights goals are likely to be realized. Meanwhile, if history is any guide, their languages and cultures will continue to erode.

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[165] J. Crawford, *Hold Your Tongue: Bilingualism and the Politics of "English Only"* (Reading, MA: Addison-Wesley, 1992), at 21.