Language, Nationality and the Law: What Lies Ahead for America?

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I. INTRODUCTION

Can a multilingual society have an element of shared community, a national identity, if it does not share a common language? Researching English language use in the United States demands investigation of topics such as cultural identity, immigration, discrimination, bilingualism, and Balkanization. Moreover, issues as diverse as those of loss, fairness, and equal rights enter into the query. This comment will first discuss the interplay of language, nationality, and cultural identity. This discussion includes an examination of the two traditional ideologies of nationalism, Multiculturalism and Democratic Universalism, as well as the more modern theory of Liberal Nationalism. This triangle, which is vital to the debate, shapes who and what is an “American.”

The two competing theories of assimilation and accommoda-
tion are investigated in the second section. Proponents of "Official English" and "English-only" laws require assimilation for inclusion. On the other hand, those who encourage retention of ethnic and cultural heritage support accommodation by the host country to its new immigrants. Finally, there is a third sector of the public that holds bilingualism to be the solution.

Section three discusses the role of the law in general. Legislation not only reflects but also shapes the attitude of the nation. For example, protection of language rights establishes "Multiculturalism" as the "American" identity. The dispute over bilingual education further exemplifies the role of the legal system in this debate and may be a predictor of future policy. In addition, immigration laws define the make-up of the immigrant population thereby creating and exacerbating some of these issues.

A closer look at present immigration law as well as some historical references provides the bulk of section four. Additionally, the present immigration pattern, resulting in the shift of English from majority to minority linguistic status in some states, presents new problems. In this new "upside down and inside out" world could we see surrealistic Title VII cases by non-Hispanic speakers?

Finally, bilingualism is often suggested as a solution, a compromise of sorts — the best of both worlds. Integral to the analysis of this recommendation is an investigation into how two other societies, Canada and Puerto Rico, deal with the issue. The analysis shows that although Canada and Puerto Rico are often cited as models for bilingualism, the statistics reveal this to be a fiction.

Nationality is defined and shaped by a shared language and culture. The America of today is not that of our founders. Immigration patterns have created a shift in the composition of the population of the United States. As a result of the high concentration of Spanish-speakers, Spanish is the majority language in certain areas of the United States. The challenge that our nation faces today is that of maintaining its American national identity. Reaffirmation of the values that we hold dear may require measures that on the surface seem to be discriminatory. Although legisla-

tion of language use may affect individual rights, it may be necessary in order to ensure survival of American nationality. These laws skate on dangerous ground and it is up to the legal community to oversee the process that will shape new policies to protect against abuse and discrimination. In the end, this is a political question. Nevertheless, the judiciary must be vigilant in order to ensure that in protecting its borders and cultural identity, America stays true to those values expressed by the rights of equal protection and due process as guaranteed by its Constitution.

II. THE ROLE OF LANGUAGE IN CULTURAL IDENTITY AND NATIONALITY

What is most unique and basic about . . . language and culture is . . . that in huge areas of real life the language is the culture and that neither law nor education nor religion nor government nor politics nor social organization would be possible without it. As a result . . . the association of "the language" with sanctity, with kinship, and with one's innermost feelings and aspirations is encountered. 7

The ability to self-identify as well as to categorize others is labeled the "motor" of human evolution, and language is the expression of this identity. 8 Self-identity develops as a result of one's relationship to family and local community. Furthermore, cultural, social and political values reflect different ethnicities and define identity. 9 In turn, language is the fundamental form of communication and reflection of this identity. 10 Above all, as a vehicle for information, language is power. Because of this connection between language and cultural identity, many categorize the controversy over language rights as one of ethnic conflict. 11 Therein lies the crux of the language controversy.

If language defines and distinguishes ethnic identity, how then does it relate to nationalism? Social scientists interpret nationalism as a congruent system of political and ideological units most commonly defined in terms of language. 12 Even those

9. Id.
10. Id.
who do not equate language with nationality acknowledge it as reflective of community. So that although adopting a common language does not guarantee national solidarity, it is often a means of protecting a collective identity. Often, it is the glue that binds a society. As such, language is often "the first object of attack... [by a] power aiming to crush out... nationality among its subject peoples." It serves as a mark of tyranny and dominion.

Beyond the general discussions of the interplay between language, cultural identity and nationalism, the key question in the United States context remains: are we, the collective population of the United States, a nation? The answer to this question may be found beyond the two traditional theories of nationalism, Multiculturalism and Democratic Universalism, in the more modern theory of Liberal Nationalism.

Multiculturalism espouses preservation of a “pure” racial and ethnic identity through a policy that encourages “voluntary segregation.” Multiculturalists do not consider America a nation-state, but rather they characterize it as “federation of racial cultures,” a “nation of nations.” This is the “salad bowl” notion of America — separate, distinct cultures that mix but do not blend together. In supporting retention of ethnicity, Multiculturalism drives a wedge through society, emphasizing differences rather than the unity of a shared idiom and culture.

Democratic Universalism also rejects the notion of America as a nation-state. Instead, this theory defines America as a group of people dedicated to the Constitution of the United States, an “Idea-State.” According to this theory, Americans are united only by their commitment to a founding idea, not by any shared cultural experience, language, or culture. Unlike the multicul-

13. See id. at 80.
14. Id.
15. Id. at 78.
16. See id. at 80.
17. LIND, supra note 2, at 15.
18. See id. at 2.
19. See id. at 4.
20. See Sara Rimer, Colleges Find Diversity is Not Just Numbers, THE NEW YORK TIMES, Nov. 12, 2002, at A1 (quoting Bradford Wilson, executive director of the National Association of Scholars on diversity in universities) (“Much of what marched under the banner of diversity and its twin in academy, multiculturalism, has resulted in division.”).
21. LIND, supra note 2, at 3.
22. Id.
23. Id.
turalists who tend to be liberals, the Democratic Universalists usually come from the more conservative political sector. In advocating the "religion of democracy," Democratic Universalists hold the "American Idea-State" as superior to all others.24

Neither Multiculturalism nor Democratic Universalism is a satisfactory theory. A nation is more than a mere shared government or set of laws.26 Accordingly, a nation cannot survive if it does not share a common culture.26 The new theory, "Liberal Nationalism," supports a more comprehensive definition of nationality and answers, in the affirmative, the question of whether or not the United States is a nation.27 This ideology defines a nation as an amalgamation of people circumscribed by a "common language, common folkways, and a common vernacular culture," not a mere assembly of disparate people segregated by their cultures and ethnic identities.28 In rejecting the rationalization for racial and ethnic segregation promoted by Multiculturalism, Liberal Nationalism seeks to engender a society where "cultural fusion is accompanied . . . by racial amalgamation."29 This is the true melting pot idea of nationality. Similarly, by rejecting Democratic Universalism's definition of "nationality" as loyalty to an ephemeral government, Liberal Nationalism allows for a more permanent identity.30

III. ASSIMILATION VERSUS ACCOMMODATION

A nation's response to migration through its borders reflects its attitude towards nationality. The two ideologies of assimilation and accommodation are based on how the host nation determines membership and national loyalty.

The assimilation ideology predicates membership in the nation on a shared culture or language. Reflective of Liberal Nationalism in its reliance on shared identity, assimilation may be associated with this definition of nationalism. In the extreme, this ideology, based on the French model, holds government responsible for defining and protecting the national culture

24. Id.
25. See id. at 5 (discussing how if this were so, "the Soviet and Romanov, and Hapsburg and Ottoman Empires would have been nations . . . rather than 'prison-houses of nations'").
26. Id.
27. Id.
28. Id.
29. Id. at 15.
30. Id. at 9.
through legislation. In order to receive equal treatment, the immigrant in France is expected to assimilate into the culture. For this assimilation to be complete, it requires adoption of both the French language and the French way of life.

In contrast to the rigid requirement of the French for assimilation, the British "civic ideology" model is a more flexible system, resembling the United States' attitude towards its immigrants. According to this model, the government is "neither the representative nor the guardian of an official culture." Immigrants are left to fend for themselves and are not required to integrate into the host society. This ideology supports Multiculturalism's emphasis on ethnic loyalty and promotes segregation and isolation of the immigrant.

The American experience reflects both the French and English models at various times. During the colonial era, America was eager for new arrivals to populate and work its vast lands. As immigration increased, however, a new attitude evolved. As the more established immigrants sought to distinguish themselves from the new arrivals, English proficiency became a way to designate their status. Earlier acceptance of foreign language use lessened, and laws previously published in German and French to accommodate those populations in Pennsylvania and Louisiana were repealed. In addition, the alliances formed during World War I prompted a further shift in attitude at home toward one common language. As a result, the United States began to develop a more protective policy towards its language and culture, shifting from accommodation towards the French assimilation model after World War II.

This focus on assimilation as a requirement for membership in the U.S. continued into the 1950s. Nevertheless, the under-

32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id. at 248 (noting that from 1805-1850 Pennsylvania had published its statutes in German; likewise from 1807-1867 Louisiana had its laws written in French to accommodate its large French speaking population).
40. Id. at 248 (discussing the dissolution of German schools, newspapers and social centers as a result of the war against Germany).
41. See generally Lind, supra note 2.
current of acceptance created by the civil rights movement of the 1950s - 1970s triggered a new phase in U.S. immigrant policy. In promoting equal treatment and acceptance of blacks, the movement fostered a newly vocal acceptance of "ethnic" minorities as well. This change in attitude was followed by a shift from assimilation of the immigrant back to the accommodation model.

According to *The Next American Nation* author, Michael Lind, this civil rights movement, which "began as an attempt to purge law and politics of racial classifications and to enlarge the middleclass to include the disadvantaged," led, instead, to a nation of incoherent communities. Unfortunately, this ideology, inspired by a desire to ensure equal treatment, resulted in the opposite effect. In stressing the ethnicity, or "foreignness," of the immigrant, Multiculturalism exacerbates this isolation and exclusion from the majority culture. Predicated on accommodation of racial and ethnic minorities through preferential, segregationist policies affecting education, employment, and political representation, the movement embraces Multiculturalism. Since the 1970s, the tenets of Multiculturalism have dictated the Nation's accommodationist policies towards its immigrant population.

Today, the immigrant still faces the same choices upon settling in a new country. Depending on the country, but to some extent in all receiving countries, he must either assimilate into the culture or expect the host country to accommodate his culture and language.

Certain conditions determine the course taken by the newly transplanted immigrant. For example, socioeconomic incentives contribute to assimilation while foreign language representation in the media promotes and reflects accommodation. Additional factors that affect assimilation include the number and concentration of immigrants in a specific area and the age of the immigrant.

42. *Id.*
43. *Id.* at 12.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 13.
49. *Id.* at 12.
at the time of migration. Large groups of people with shared ethnic and linguistic traits concentrated in a designated area tend to resist assimilation.

These groups look to the host country for accommodation to their linguistic and cultural identities. When such a large population is clustered in one area, the host often has no alternative other than to accommodate these new inhabitants. Public policy adjustments must be made in order to safeguard due process rights and safety of the immigrants. Accommodations such as translation of public service, safety announcements, and voting ballots are just a few of the concessions made for non-English speakers. Similarly, employees such as hospital workers and police must be able to communicate with the sizeable non-English speaking population. In addition to providing for inclusion in the political process and access to basic social services, these accommodations call for a significant financial investment. For example, the Los Angeles City Council has doubled its annual printing budget to $1 million for printing all of its public notices in six foreign languages, and San Matteo, California, spent $500,000 this year for the addition of two languages to its ballots.

The large Hispanic presence in the United States exemplifies the effects of clustering and language retention. The official census figure of 35 million Hispanics living in the United States fails to include at least 8 million undocumented Hispanic immigrants. This high concentration of Hispanics in specific areas of the country reduces the need to acquire English and promotes retention of the Hispanic culture and language. In his article, Jorge Ramos, Univision's news anchor, notes that the United States is under-

54. U.S. English, Inc.: Towards a United America, supra note 52 (noting a U.S. Department of Labor study printed in Monthly Labor Review in 1992 that indicated that immigrants acquired the host country language more quickly when not surrounded by their native language).
56. Univision is the largest Hispanic television station in the United States.
Ramos boasts that he can go for days in Miami, Florida, without having to say a word in English because Spanish is spoken in “every corner of the country.” Interestingly, Ramos also remarks that most Spanish-language newscasters and television personalities do not speak English. Declaring the melting pot model of America a fallacy, Ramos notes that Hispanics are the only immigrants who have successfully integrated economically into the United States without having to lose their culture and language. Furthermore, the continued growth and power of the Hispanic population is guaranteed. There are two main reasons for this assurance; Hispanics have more children than other cultures, and the continued illegal immigration of close to 350,000 Mexicans across the border every year. At this rate, Ramos predicts that in fifty years there will be over 100 million Hispanics living in the United States.

As a result of this trend, there is tremendous interest in the Hispanic sector by both advertisers and politicians. Nationwide, the November 2002 candidates spent at least $8 million on campaign ads geared specifically to appeal to Hispanics. Attributing this investment to the growing importance of the Hispanic vote, reporter Lizette Alvarez also points to the growing audience of Spanish-language television networks. A survey of 1,206 Hispanic households in seven major cities by a major marketing firm

57. Ramos, supra note 56.
58. Id.
59. Id.
60. Id.
61. Hispanics average three children per family as opposed to two children in Anglo families. Id.
62. Id.
63. Id.
64. A survey of 1206 Hispanic households in Los Angeles, Miami, San Francisco, Chicago, Houston, and San Antonio by media firm Yankelovich reports some noteworthy facts about Hispanics in 2000. According to this survey, 53%, up from 44% in 1997, say that they prefer using the Spanish language in every situation in their lives—from watching television at home and work. Whereas in 1997, 63% of Hispanics said that the Spanish language was more important to them now than five years earlier, in 2000, 69% felt that way. Yankelovich, Yankelovich Releases the 2000 Hispanic Monitor Results, Oct. 26, 2000, available at http://secure.yankelovich.com/about_us/hispanic_release.asp.
66. Id.
67. Alvarez attributes this to the increasing numbers of new immigrants who look to these stations for “news and entertainment.” Id.
revealed that Hispanics express a reduced interest in speaking English and assimilating into the non-Hispanic culture.\textsuperscript{68} Citing increased opportunity to demonstrate their culture and the highly visible success of other Hispanics, the study shows that 53\% of Hispanics prefer using the Spanish language in every situation.\textsuperscript{69} This preference is most likely responsible for the huge success of Spanish television and radio stations and more clearly exhibits the accommodation model at work in the United States.\textsuperscript{70}

The sheer number of Hispanics, coupled with their associated political and economic power, is particularly critical to language policy when one examines the statistics provided by the United States Census Bureau. For example, a 1990 survey indicated that only 68\% of those living in California spoke English-only at home, 20\% spoke Spanish, 50\% of those "spoke English less than very well."\textsuperscript{71} In Miami-Dade County, Florida, the figures are even more compelling. Of the total population surveyed, 43\% spoke English-only at home, whereas 50\% spoke Spanish or Spanish Creole.\textsuperscript{72} The 2000 Census supports prior predictions that these figures will continue to increase.\textsuperscript{73} Of the 1,695,940 people over eighteen years old living in Miami-Dade County, only 32\% speak English-only at home while almost double that number, 60\% speak Spanish or Spanish Creole.\textsuperscript{74} The figures for the five to seventeen year olds show a similar split with twice as many speaking Spanish or Spanish Creole at home as compared to English-only.\textsuperscript{75} These statistics illustrate that Hispanic language retention by the immigrants and their families is accompanied by a failure to acquire the English language. With such large groups of Hispanics clustered in a small number of cities, it is likely that language will continue to play a key role in the assimilation versus accommodation controversy.

Hispanic language retention by those who immigrate to the U.S. and their failure to acquire the host country language continues. Balkanization of the two groups, those who demand assimila-

\textsuperscript{68} See Yankelovich, supra note 64.
\textsuperscript{69} Id.
\textsuperscript{70} See Keveney, supra note 50.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
tion for inclusion and those who promote retention of ethnic identity and espouse accommodation, will likely intensify as the number of Hispanic immigrants continues to increase daily and the incentive to acquire English decreases. The trend towards accommodation for non-English speakers is at an all-time high. The number of Spanish media organizations is on the rise and politicians are spending a large percentage of their campaign funds to entice the growing majority of Hispanic voters.

The contrast between those who assimilate and become part of the "melting pot," and those who demand accommodation as they retain their cultural and linguistic autonomy will increase as the gap between those who speak English and those who do not widens.

IV. THE ROLE OF THE LAW

Legal involvement in this debate is showcased in three major arenas. First, language rights are addressed as civil rights guaranteed by the Constitution. Second, beyond the civil rights aspect, the legal system revisited this matter of language in the conflict over bilingual education. Third, the United States immigration policy, as directed and reflected in its immigration laws, not only contributes to this debate by setting a pattern of increased Hispanic migration which has created much of the present "problem," but continues to exacerbate it.

Meyer v. Nebraska, the first case to raise language rights, was resolved in 1923 on a substantive due process analysis.76 A school-teacher was charged with violating a Nebraska law that prohibited the teaching of a foreign language after eighth grade. Meyer challenged the law as unconstitutional. In its analysis, the Court adopted the expansive definition of liberty to "denote[ ] 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 . . . bring up children."77 In a shrewd shift, the Court focused on the fundamental right of the teacher to pursue a living when it ruled the Nebraska law forbidding instruction of foreign language illegal.78 The Court found that the statute interfered with the rights of the student to acquire a foreign language, as well as that of his parents to control

77. Id.
78. Id.
their child's education.79 Although the Meyer court declared the law unconstitutional, it fell short of declaring a constitutionally granted language right.

Similarly, in its second case involving language, Yu Cong Eng v. Trinidad, the Court again refused to classify language as a fundamental right and chose to analyze the issue using the substantive due process and equal protection doctrines.80 Yu Cong Eng involved a Filipino law that prohibited the keeping of accounting books in any language other than English, Spanish, or a Filipino dialect. The Filipino government claimed this statute was an effort to facilitate its ability to verify the financial records of Chinese businesses and curb tax evasion.81 This law affected over 12,000 Chinese accountants working in the Philippines at the time, as well as their clients, many of whom spoke and read only Chinese. In its decision, the Court relied on Meyer's fundamental rights analysis and in a similar ruling concluded that the Filipino statute deprived the Chinese accountants of their right to pursue their occupation of choice and therefore was an infringement on their liberty without due process of law. Additionally, the Yu Cong Eng court found:

[A]s against the Chinese merchants of the Philippines, we think the present law, which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws.82

In extending the analysis to include an equal protection discussion not found in Meyer, the Court here declared the statute invalid in spite of the Filipino government's stated purpose of facilitating consistency of public records. Generally, however, courts have set the lowest standard of scrutiny in addressing Fourteenth Amendment violations in language law challenges.83 The mere finding of a legitimate reason for the policy and its rational relation to the interest of the party has sufficed to allow English-only rules.84

79. Id.
81. Id.
82. Id. at 528.
84. Id.
It was only in 1991 dicta in Hernandez v. New York that the Court allowed the possibility that language may serve as a pretext for discriminatory intent. Hernandez alleged discrimination when the prosecutor at his criminal trial used his peremptory challenges to eliminate Hispanic jurors from the jury. In his defense, the prosecutor pointed out that since the victims were also Hispanic, he had nothing to gain by specifically excluding Hispanics from the jury. Rather, he indicated the jurors' language deficiencies and inability to follow the trial as the reason for their exclusion from the panel. The Court concluded that since the prosecutor was able to provide race neutral reasons for his rejection of these jurors, he had no discriminatory intent to eliminate them. Therefore, the Court found no violation of Hernandez's equal protection rights.

Traditionally, courts also analyzed the question of language rights using the civil rights framework. However, even though the Civil Rights Act of 1964 allows for claims of discrimination on the basis of national origin, several circuit court cases have been unwilling to treat English-only rules as national origin discrimination. In their reluctance to do so, the courts have upheld English-only workplace rules by applying the easily satisfied rational basis standard for validation of these rules.

Additionally, district courts have also analyzed challenges to English-only rules on the basis of equal protection violations. In 1982, the District Court for the Eastern District of New York ruled on a case alleging discrimination for failure to provide written and oral Spanish translation of Social Security policies. In Soberal v. Schweiker, the plaintiff claimed a denial of equal treatment and due process when his interview and the resulting letter

86. Coltharp, supra note 83, at 170-172.
88. Id. at 357.
89. Id. at 356-7.
90. Id. at 362-3.
91. Coltharp, supra note 83.
93. Id. at 243-246, n.253 (discussing Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. (1980)).
94. Id.
96. Id. at 1165.
of denial of social security benefits were in English. Soberal sought money damages as well as future translation of all Social Security forms and proceedings.

The court began its analysis of the equal protection claim by stating, "the threshold determination . . . is the governmental basis for the classification at issue." In its quest for classification, the court noted that this was not a "suspect" category triggering the strict scrutiny standard of analysis. Additionally, the court distinguished English proficiency from categories such as legitimacy and gender that call for application of the intermediate standard of review and found that "English is not a status fixed at birth."

Moreover, the court was unwilling to equate language with ethnic origin. Specifically, the court explicitly declared, "language per se is not a characteristic protected by the Constitution from rational differentiation." Lastly, the district court found that this government practice did not distinguish between "Hispanic/non-Hispanic but . . . [rather between] English speakers/non-English speakers." Furthermore, the Supreme Court had already determined that a "noncontractual claim" to receive funds from the public treasury is not a fundamental right. Therefore, the court concluded that the Constitution did not "mandate[ ] a multilingual government." Having decided that language proficiency was not a suspect category and did not trigger the strict scrutiny test the court further noted the lack of intent to discriminate by the government and applied the rationally related standard. The court found the government's policy practice to have "objective rationality and historical justification." In concluding, the court determined that any other decision would necessitate the political process since "Congress should have discretion in deciding how to expend necessarily limited resources."

Criminal defendants have also raised claims of equal protection violations related to language use. In response to these

97. Id. at 1173.
98. Id. at 1174.
99. Id.
100. Id.
101. Id.
103. Soberal, 549 F.Supp. at 1173.
104. Id. at 1175 (noting money, time and administrative "disruption" would be required to provide translation into Spanish).
105. Id.
cases, Congress enacted the Court Interpreters Act of 1978. In its 1970 decision, U.S. ex rel. Négron v. New York, the Second Circuit Court of Appeals ruled that the second-degree murder conviction of a Puerto Rican farm worker was unconstitutional. Even though the court was well aware of Négron’s inability to speak or understand English, it allowed his murder trial to continue without providing him with a translation of the proceedings. The court of appeals agreed with the lower court that this violated the “basic and fundamental fairness required by the due process clause.” The Court of Appeals likened Négron’s language deficiency to a mental disability rendering him incompetent to stand trial or to waive his rights without the use of a translator. Furthermore, the court found that such a failure by the trial court completely undermined the “[c]onsiderations of fairness, the integrity of the fact-finding process, and the potency of . . . [the] adversary system of justice.” The court of appeals affirmed the circuit court’s decision to grant Négron a writ of habeas corpus.

V. OFFICIAL ENGLISH

Although the founding fathers did not specify English as the official language of the United States, consideration was given to establishment of a national language. A chronology of the English-only movement reveals the Nation’s concerns over language use in the United States from the 19th century onwards. By the 1980s many states had already enacted laws declaring English as their sole language. It was the decade of the 1980s that brought the debate to the national level. As rising immigration inspired legislation, the well-funded organization U.S.
English led a crusade to declare English the official language of the United States. 116

Florida's Miami-Dade County triggered the challenge to accommodation when, in 1980, as a response to the flood of predominantly Hispanic immigrants from Cuba and Central America, the citizens of Miami-Dade County passed an "anti-bilingual ordinance" by a vote of 59%. 117 This initiative repealed the 1973 ordinance that had declared the county "bilingual and bicultural." 118 The 1980 ordinance prohibited expenditure of county funds for the use of any language other than English or for the promotion of any culture other than that of the United States. In addition, the ordinance required that all government meetings be conducted in English. 119 Later, in 1984, this rule was amended to allow for Spanish translations of certain safety, emergency and tourism-based exceptions. 120

A year later, on the national level, California Senator Hayakawa introduced his English Language Proposal Amendment to declare English the official language of the United States. 121 Although this initiative failed, similar proposals have followed it almost every year. 122 Two years later, Hayakawa joined forces with the head of the Federation for American Immigration Reform to found U.S. English. 123 U.S. English continues its mission to promote English as the only official language of the United States. 124

Perhaps no other state has enacted more legislation on language use than California. A study of the propositions adopted by California may yield insight into the mood of the Nation and a view of the future. The first of these, Proposition O, calling for an end to bilingual ballots, was passed by a vote of 63% in 1983. 125 The next year, Californians approved the "voting Materials in English Only" Proposition 38. This measure placed California in direct conflict with the federal Voting Rights Act. 126

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116. Id. at 91.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id. (amendment failed).
122. Id.
123. Id.
125. Draper, supra note 114, at 90.
126. Id. at 91.
tion 63, which allowed for suits against the state or local government by any person or business for failure to acknowledge or promote the use of English as the "common language of California," passed by a 73% vote in 1984. In 1988, however, the Ninth Circuit Court of Appeals dealt Proposition 63 a blow with its decision in Gutiérrez v. Municipal Court, which is discussed in detail below, when it declared the statute to be "primarily symbolic."

Other states followed California's lead and by 1984 Indiana, Kentucky, and Tennessee had each declared English to be its official language. Additionally, an immigration bill was introduced requiring "minimal understanding of ordinary English" for permanent residency. Although the bill passed in the House, yet the House and the Senate were unable to agree on the final language, thus the law never materialized. Meanwhile, in 1986, as the controversy grew, two more Official English organizations, English Only and the American Ethnic Coalition, joined the debate.

In 1988, Florida again voted on the language issue. Florida voters amended their constitution to declare English the official language by a vote of 84%. In her article, Language, Power, and Identity in Multiethnic Miami, doctoral candidate Joanne Bretzer, attributes this vote to intensification of language conflicts due to the "rapid and profound demographic changes" of the city. The result of unchecked migration from Cuba into the South Florida community had created an American city with a Hispanic majority. As the number of Hispanics grew, their economic and political power expanded. The clustering of these immigrants contributed to their ability to reside in Miami without assimilating linguistically. This highly visible trait of "foreignness" exacerbated ethnic conflicts and inspired the anti-bilingual

127. Id. at 92.
129. Draper, supra note 114, at 93.
130. Id. at 91.
131. Id.
132. Id. at 92.
133. Id. at 93. Arizona and Colorado also added Official English amendments to their constitutions that year. Id.
134. Id.
136. Id. at 211.
Other states experienced a similar increase in Hispanic migration and by the end of 1990, seventeen states had Official English rules. Reflective of the continued concern over language issues, proposals to amend the United States Constitution and declare English the official language of the United States are routinely introduced to Congress.\textsuperscript{138}

A look at case law addressing English-only rules reflects the conflicting attitudes of the nation. The Fifth Circuit Court of Appeals was the first to hear a case challenging an English-only rule.\textsuperscript{139} In 1980, the court in \textit{Garcia v. Gloor} held that a rule requiring an employee to speak English-only at the work place was not discriminatory.\textsuperscript{140} The Court reasoned that since Garcia could speak English, language was a mutable characteristic, and therefore a finding of discrimination was not appropriate.\textsuperscript{141} In contrast, the court acknowledged that for someone who does not speak English, language might indeed be an “immutable characteristic like skin color, sex, or place of birth.”\textsuperscript{142} The \textit{Gloor} court explicitly noted that there was no “common understanding” equating national origin discrimination with language policies.\textsuperscript{143} In addition, the court found that neither disparate impact nor disparate treatment tests supported the claim of discrimination.\textsuperscript{144}

The next English-only case, \textit{Jurado v. Eleven-Fifty Corp}, was presented in 1987 to the Ninth Circuit Court of Appeals.\textsuperscript{145} Jurado was a bilingual disc jockey whose employer prohibited him from speaking Spanish while on the air. Jurado challenged the English-only rule as discriminatory, claiming that it had a disparate impact.\textsuperscript{146} The \textit{Jurado} court accepted the \textit{Gloor} classification of language as mutable and applied the rationally related test to the radio station’s English-only edict.\textsuperscript{147} In its reasoning, the court noted that since the disc jockey spoke English as well as Spanish, the rule was not a hardship to him. Therefore, the rule did not have a disparate impact. Moreover, the court found that the

\textsuperscript{137} Id. at 212-3.
\textsuperscript{138} Id.
\textsuperscript{139} Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), \textit{cert. denied} 499 U.S. 1113.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 270.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987).
\textsuperscript{146} Id.
\textsuperscript{147} Id.
English-only rule was rationally related to the radio station's business.

It was not until the 1988 decision in Gutiérrez v. Municipal Court that a court allowed the connection between language and national origin. The three-judge panel held that an English-only law requiring all employees of the municipal court to speak only English unless assisting the general public was discriminatory. Recognizing that "language and accents are identifying characteristics," the court determined that "rules which have a negative effect on bilinguals, individuals with accents, or non-English speakers, may be mere pretexts for intentional national origin discrimination."

In conceding that the rule had a disparate impact on Hispanic employees, the court applied the strict scrutiny standard of review. Consequently, it found the rule unconstitutional. It was the first time that a court found a language law to have a disparate impact on Hispanic employees. However, this ruling explicitly conflicted with the previous decision of the Fifth Circuit Court of Appeals in Gloor, as well as its own ruling in Jurado. The Gutiérrez dissent underscored the conflicting attitudes of the circuits by pointing to the inconsistencies in application of the previous cases. Specifically, the dissent objected to the rejection of the Gloor and Jurado findings that language regulation was not linked to national origin discrimination. In his opinion, demanding that the Ninth Circuit rehear the case en banc, Judge Alex Kozinski exposed the inconsistencies in the decision and asserted that the decision would exacerbate the ethnic tensions already present in the community.

149. Id.
150. Id. at 1039.
151. Id.
152. Id. The city claimed that the rule was necessary because non-Spanish speaking employees were uncomfortable when the Hispanics spoke in a language they did not understand.
153. Id.
154. Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).
155. Gutiérrez, 861 F.2d at 1188, 1190 (noting that Gutiérrez directly contradicted Gloor, and Jurado was rewritten to fit the decision).
156. Id.
157. Priatt, supra note 107, in LOYALTIES, supra note 4, at 281.
A subsequent case, however, allowed for the court's return to the principles established in *Gloor* and *Jurado*, and marked its rejection of the policy linking language with national origin discrimination. In *Garcia v. Spun Steak Co.* the court again specifically rejected the claim of disparate impact when it refused to adopt a *per se* rule granting protection for cultural expression through language use. The Ninth Circuit Court of Appeals acknowledged that "in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination." Additionally, the court acknowledged the potential for abuse, noting that the "draconian" enforcement of such a rule may result in harassment. The court called for an evaluation of the totality of the circumstances in relation to the particular context in which the claim arises.

VI. **BILINGUAL EDUCATION**

Another much litigated area in the debates dealing with language rights is that of bilingual education. Congress initially provided federal funding for bilingual education with the Bilingual Education Act of 1968, and later extended the program to 1988, creating funding for new educational programs.

The passion inspired by this issue continues to mobilize both supporters and critics. Critics claim that bilingual education has lost its role as a transitional device for teaching English. No longer focusing on teaching English and assimilation, this system now promotes ethnic and cultural retention. Schools receive additional money for their bilingual programs, which are distributed on a per capita basis. As a result of this scheme, school systems are loath to promote students out of the program and lose

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158. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

159. *Id.*

160. *Id.* at 1490.

161. *Id.* at 1489.

162. *Id.*

163. *Id.*

164. Draper, *supra* note 114, at 90.


166. *Id.*
the federal funds appropriated by Congress. Opponents of bilingual education charge school systems with self-interest in promoting these programs. In spite of this systemic promotion of bilingual education, the present trend seems to be running against it as more educators and parents join the ranks of dissatisfied opponents to the system.

In its first look at education and language, the U.S. Supreme Court in Lau v. Nichols held that the school system violated the Civil Rights Act of 1964 when it failed to provide supplemental education for Chinese speaking students in 1973. In this landmark case, however, the Court specifically refused to address the Fourteenth Amendment argument when it reasoned that the state of California violated its own Education Code as well as Department of Health, Education, and Welfare Regulations. Notably, in his concurrence, Justice Blackmun, joined by Justice Burger, warned against broad interpretation of the holding. Justice Blackmun noted the sheer number of children involved and advised that the decision might be different if only a few children were affected. In addition, Justice Blackmun commented on the ability of previous generations to overcome the language barrier, crediting "earnest parental endeavor" or just the reality of "being pushed" out into the community. This concurrence prompted The Equal Educational Opportunities Act of 1974, which granted an individual right of action to any child with limited English skills.

In reference to bilingual education, California once again seems at the forefront, setting the tone for the nation. The voters adopted Proposition 227 in 1998 with a 60% victory. This initiative seeks to replace bilingual education with English immersion and stemmed from complaints by immigrant parents as well as educators. Among the chief supporters of this initiative were some of bilingual education's most active previous supporters.

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168. Id.
170. Id.
171. There were approximately 1,800 children affected. Id.
172. Id.
173. Id.
176. Id.
These people credit their change of heart to the program's failure as evidenced by test scores showing that the scores of Hispanic children in English immersion programs are twice as high as those of the students in bilingual programs.\textsuperscript{177} In addition, educational scores of children in California two years after adoption of Proposition 227 also show a marked improvement.\textsuperscript{178} Colorado and Massachusetts also placed similar initiatives on their November 2002 ballots. Massachusetts voters passed the anti-bilingual initiative by a 68\% vote.\textsuperscript{179} Conversely, Colorado's initiative was defeated by a 56\% vote.\textsuperscript{180}

The controversy over bilingual education continues to rage on. As the factions for and against bilingual education become more vocal and the debate intensifies the trend points to further debates as more states introduce legislation to eliminate funding and phase out bilingual programs.\textsuperscript{181} Unusual alliances are formed in this battle with Hispanics joining the campaign to dismantle the bilingual educational system.\textsuperscript{182} Parents are questioning the value and efficacy of the programs\textsuperscript{183} as test scores indicate failure of the system.\textsuperscript{184} Several states have already replaced bilingual education mandates with English immersion programs.\textsuperscript{185} For now, bilingual education seems to be losing ground.

\section*{VII. IMMIGRATION PATTERNS}

The dispute intensifies as the immigration flow into the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{177}.]
\item Id.
\item See Steve Sailer, \textit{Q & A with Ron Unz on Bilingual Education}, \textit{United Press}, Sept. 25, 2002 (Unz announced he will work with Massachusetts and Denver).
\item See Yi, supra note 167.
\item See Letter from Manuel S. Klausner to Members of the Board, State Board of Education of California (Feb. 1, 2002), available at http://www.onenation.org/article.cfm?ID=5094 (noting that mean percentile test scores of California's immigrant students have risen by 50\% on average since the passage of Proposition 227).
\item California Proposition 227 passed in 1998; Arizona measure passed in 2000; Colorado's English Language Proficiency Act, supporting English immersion, was defeated in November 2002; Massachusetts' proposition passed in the November 2002 election.
\end{enumerate}
\end{footnotesize}
United States continues. Immigration policy determines the number and nationality of incoming immigrants, notwithstanding those who arrive illegally. Before 1970, most of those migrating to the United States were from Europe. When Congress repealed the national origin quotas in 1965, however, the composition of those migrating to the United States changed. Today over 69% of the foreign born in the United States come from Mexico, Central and South America, the Caribbean and East Asia.186

Further studies indicate that the flow of Hispanics will continue to increase, as it remains unchecked by the historic quotas of the pre-1920s.187 As a result, this pattern of clustering of Hispanics will likely continue.188 Statistics show that the top five states receive 78.2% of all new immigrants. This is in contrast to the 54% they received in the 1910s. Today these top five states take in 47.9% of the total number of immigrants as opposed to 35.6% in the 1910 survey.189 As a result, the 8.8 million immigrants in California account for 30.9% of the country’s total immigrant population.190

This pattern becomes more significant when one looks at the impact it will have on population growth in the United States. Between 1990 and 2000, immigration accounted for 50.3% to 69% of the country’s total population growth.191 These figures include births to women who have migrated here as well as the new arrivals. The estimated impact on population growth is even more startling when one breaks these numbers down by state. In New York, California, New Jersey and Massachusetts, immigration is estimated to provide up to 100% of the population growth,192 indicating that without immigration, these states would likely see a decline in population.193 This reinforces the clustering mechanism and discourages assimilation. Clustering, coupled with the increase of non-English speaking residents and businesses perpetuates communities where English is not needed and the incen-

186. Camarota, supra note 5, at 6.
187. Prior to the 1920s quotas were set for each country based on the previous year’s admissions from that country. As a result of this system, the preference for immigration of Western Europeans perpetuated the composition of the country. See Cornell, supra note 51, at 609.
188. Id.
189. Id. at n.41.
190. Camarota, supra note 5, at Table 3.
191. Id.
192. Id. at Table 6.
193. Id. at 6.
tive to learn English is reduced.\textsuperscript{194}

\section*{VIII. Models of Bilingualism: A Comparative Analysis}

\subsection*{A. Puerto Rico}

English and Spanish have been the official languages of Puerto Rico by law since 1902.\textsuperscript{195} In 1991, however, this law was repealed and Spanish became the only official language of the country.\textsuperscript{196} But this 1991 statute was quickly repealed the next year and once again Puerto Rico became officially bilingual.\textsuperscript{197} The reality, however, is that while 98.2\% of Puerto Ricans speak Spanish, only 47.4\% speak any English and at best 23.6\% are fluent in English.\textsuperscript{198} Further debunking of the bilingual myth is supported by the requirement that all judicial proceedings in Puerto Rico be in Spanish.\textsuperscript{199} Additionally, although Puerto Rico’s constitution requires that all legislators read and write in either Spanish or English, all legislative and executive procedures are conducted in Spanish.\textsuperscript{200} Furthermore, all secondary public school education is in Spanish.\textsuperscript{201} Similarly, almost all private affairs are conducted in Spanish.\textsuperscript{202} The only concession to English involves proceedings of the United States Court of Appeals, which must be written in English.\textsuperscript{203} Although by law Puerto Rico is bilingual, in reality it is a monolingual state with Spanish as its language.

\subsection*{B. Canada}

Canada, too, has used legislation as a means to create equity for its bilingual population. In passing the Multiculturalism Law of 1988, Canada was the first country to attempt to protect its languages and cultures legislatively.\textsuperscript{204} Recent statistics, however, show that the majority of Canadians are English speakers.\textsuperscript{205}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{194} Cornell, \textit{supra} note 51, at 607-611.
\item \textsuperscript{195} Alvarez-Gonzalez, \textit{supra} note 6, at 363.
\item \textsuperscript{196} \textit{Id}.
\item \textsuperscript{197} \textit{Id}.
\item \textsuperscript{198} \textit{Id}.
\item \textsuperscript{199} \textit{Id}.
\item \textsuperscript{200} \textit{Id}.
\item \textsuperscript{201} \textit{Id}.
\item \textsuperscript{202} \textit{Id}.
\item \textsuperscript{203} \textit{Id}.
\item \textsuperscript{204} Bourhis & Marshall, \textit{supra} note 11, at 246.
\item \textsuperscript{205} \textit{Id}.
\end{itemize}
\end{footnotesize}
Only 23% of Canadians list French as their mother tongue and only 17% consider themselves bilingual. Québec directly attributes the increase in French speakers to the passage of Bill 101 as English speakers living there had to learn to speak French. In addition to declaring French the official language, Bill 101 took several other measures to ensure preservation of the French language and culture. To begin with, the bill obligated all immigrants to send their children to French schools. In addition, it protected French speakers from being fired because they were monolingual. Furthermore, the bill also established a "Francization" program encouraging businesses of more than fifty employees to adopt French as their work language. This law cemented the status of French as a language in Québec and is an example of preservation of a language by legislation.

Canada's attempt to legislate for the language issue seems to have failed to provide the Québécois with their desired autonomy. Québec shows its increasing dissatisfaction with the state of affairs by repeated attempts to secede from Canada. The last election sent a particularly sobering message as 93% of Québec's citizens voted a mere 50.5% to remain within Canada.

While both Puerto Rico and Canada espouse, on paper, the idea of bilingualism, neither provide an effective model. The failure of both countries to implement and achieve bilingualism may indicate the impossibility of true bilingualism. In addition, the resulting inability of language legislation to achieve this goal raises serious doubt about the effectiveness of this type of legislation.

IX. Conclusion

If, as discussed, Hispanics comprise the majority in at least four states, will these states follow Québec's example? How can we be sure of the answer? Density and homogeneity seem to suggest a logical connection. In an upside down and inside out world, since Spanish is the majority language in these states, is there a cause of action for English only speakers under Title VII? The disparate impact or disparate treatment tests may allow for these types of cases in the not too remote future.

206. Id. at 252.
207. Id. at 253.
208. Id. at 256.
209. Id. at 257.
210. Id. at 258.
In a speech entitled “The Children of the Crucible,” delivered during the First World War in 1917 and signed by thirty-eight prominent citizens, President Theodore Roosevelt proclaimed:

We must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington’s Farewell address, of Lincoln’s Gettysburg speech and second inauguration . . . . The greatness of this nation depends on the swift assimilation of the aliens she welcomes to her shores.\(^\text{211}\)

Physical, geographic boundaries do not define a nation. A nation consists of a collective group of individuals who share a cultural identity. A key component of this identity is acquired and reflected in language. Without a shared language, we the collective population of the United States cannot share a national identity and therefore, we are not a nation.

**Josiane Deschamps Abel**

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211. Theodore Roosevelt, *One Flag, One Language*, in *Loyalties*, supra note 4, at 85.

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