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# English-Only Laws and the Fourteenth Amendment: Dealing with Pluralism in a Nation Divided by Xenophobia

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## CASE NOTE

### ENGLISH-ONLY LAWS AND THE FOURTEENTH AMENDMENT: DEALING WITH PLURALISM IN A NATION DIVIDED BY XENOPHOBIA

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I. INTRODUCTION TO *ARIZONANS FOR OFFICIAL ENGLISH V. ARIZONA*

In 1988, Arizonans approved by a one-percent margin a state constitutional amendment prohibiting the state government's use of languages other than English.<sup>1</sup> The amendment was the result of a petition drive initiated by the organization, "Arizonans for Official English."<sup>2</sup> The amendment became Article XXVIII (Article 28) of the Arizona Constitution and was entitled "English as the Official Language."<sup>3</sup> Article 28 provides that

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1. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (9th Cir. 1995) (en banc), *cert. granted*, *Arizonans for Official English v. Arizona*, 116 S. Ct. 1316 (1996), *vacated as moot and remanded*, 117 S. Ct. 1055 (1997). The amendment drew affirmative votes of 50.5% of Arizonan citizens casting ballots in the election. *Yniguez*, 69 F.3d at 924. The amendment passed by a margin of 580,830 to 569,993. Note, *Constitutional Law—First Amendment—Ninth Circuit Invalidates Arizona Constitution's Official English Requirement*, 109 HARV. L. REV. 1827, 1827 (1996).

2. *Yniguez*, 69 F.3d at 924.

3. *Id.* Article 28, Section I Arizona Constitution:

1. English as the Official Language: Applicability  
Section 1.

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

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

(3)(a) This Article applies to:

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

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

(iii) all statutes, ordinances, rules, orders, programs and policies,

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

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. Requiring This State to Preserve, Protect and Enhance English.

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

3. Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions

Section 3.

English is the official language of the State of Arizona and that the "State and all [of its] political subdivisions"<sup>4</sup> including "all government officials and employees during the performance of government business"<sup>5</sup> ... shall act in English and in no other language."<sup>6</sup> Under the new amendment, English "is the language of the ballot, the public schools and all government functions and actions."<sup>7</sup> Although twenty-two states have adopted English-Only laws,<sup>8</sup> Arizona's Article 28 is "by far the most re-

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(1) Except as provided in Subsection (2):

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

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(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 crimes.

4. Enforcement; Standing

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

RAYMOND TATALOVICH, NATIVISM REBORN?: THE OFFICIAL ENGLISH LANGUAGE MOVEMENT AND THE AMERICAN STATES 263-65 (1995) (citing ARIZ. CONST. art. XXVIII, §§ 1-4).

4. ARIZ. CONST. art. XXVIII, § 2.

5. *Id.* art. XXVIII, § 1(3)(a)(iv).

6. *Id.* art. XXVIII, § 3(1)(a).

7. *Id.* art. XXVIII, § 1(2).

8. Cecilia Wong, *Language Is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans for Official English*, 30 U.C. DAVIS L. REV. 277, 278 n.6 (1996). Besides Arizona, the states that have adopted such provisions are: Alabama, ALA. CONST. amend. 509; Arkansas, ARK. CODE ANN. § 1-4-117 (Michie 1995); California, CAL. CONST. art. III, § 6; Colorado, COLO. CONST. art. II, § 30a; Florida, FLA. CONST. art. II, § 9; Georgia, GA. CODE ANN. § 50-3-100 (Supp. 1996); Hawaii, HAW. CONST. art. XV, § 4; Illinois, 5 ILL. COMP. STAT. ANN. § 460/20 (West 1993); Indiana, IND. CODE ANN. § 1-2-10-1 (West 1996); Kentucky, KY. REV. STAT. ANN. § 2.013 (Michie 1992); Mississippi, MISS. CODE ANN. § 3-3-31 (1991); Montana, MONT. CODE ANN. § 1-1-510 (1995); Nebraska, NEB. CONST. art. 1, § 27; New Hampshire, N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1995); North Carolina, N.C. GEN. STAT. § 14512 (1995); North Dakota, N.D. CENT. CODE § 54-02-13 (1989); South Carolina, S.C. CODE ANN. § 1-1-696 (Law. Co-op. Supp. 1995); South Dakota, S.D. CODIFIED LAWS § 1-27-20 (Michie Supp. 1996); Tennessee, TENN. CODE ANN. §

strictively worded official-English law to date."<sup>9</sup>

In 1988, *Yniguez v. Arizonans for Official English* challenged the constitutionality of Article 28 in the federal district court, when Maria-Kelly Yniguez, a Hispanic and bilingual employee of the Arizona Department of Administration, filed an action against the State of Arizona, the Governor of the State of Arizona, the Attorney General of the State of Arizona, and the Director of the Arizona Department of Administration.<sup>10</sup> Yniguez, who handled medical malpractice claims for the State, claimed she ceased speaking Spanish on the job for fear of discipline under the amendment and filed an action seeking an injunction against enforcement of Article 28 as well as a declaration that Article 28 violated her First and Fourteenth Amendment rights.<sup>11</sup> Yniguez's complaint was subsequently amended to include a Hispanic state senator from Arizona as a plaintiff.<sup>12</sup> However, the district court later ruled that the senator's claims were barred as to all of the defendants.<sup>13</sup> The court also barred Yniguez's claims against the Attorney General of the State and the Director of the Arizona Department of Administration, but maintained her claim against the Governor of Arizona.<sup>14</sup> The district court found that only the Governor had the

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4-1404 (1991); Virginia, VA. CODE ANN. §§ 22.1-212.1 (Michie 1993 & Supp. 1996); and Wyoming, WYO. STAT. ANN. § 8-6-101 (Michie 1996).

9. *Yniguez*, 69 F.3d at 927 (citing Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325, 337 (1991)).

10. *Yniguez*, 69 F.3d at 925.

11. *Id.* at 924. Prior to the passage of the amendment, and because Yniguez was fluent in both English and Spanish, Yniguez often communicated with her non-English-speaking claimants and her bilingual claimants in Spanish. *Id.* It is important to note that the language restriction imposed by Article 28 will send a message deterring languages other than Spanish from being spoken in public offices including sign language and the indigenous languages of Apache, Hopi, Hualapai, Navajo, O'odham, Yaqui, and Havasupai—all of which are spoken by certain percentages of Arizonans. Brief of Amici Curiae Linguistic Society of America and National Council for Languages and International Studies in Support of Respondents at 1-4, *Yniguez* (No. 95-974), available in 1996 WL 413764.

12. *Yniguez*, 69 F.3d at 925 (citing *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990)). The Hispanic state senator, Jaime Gutierrez, claimed he feared being sued under Article 28 if he continued speaking Spanish when communicating with his Spanish-speaking constituents. *Id.* The senator was concerned about the impact Article 28 would have on the speech rights of the Hispanic population of Arizona. *Id.*

13. *Id.* The court found that none of the defendants had enforcement power against the senator sufficient to satisfy the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) (under this doctrine, a federal court can grant relief by compelling state officials to comply with federal law), because state executive branch officials do not have the authority to prosecute members of the legislative branch. *Yniguez*, 69 F.3d at 925.

14. *Yniguez*, 69 F.3d at 925. The district court found that because the Attorney

authority to enforce Article 28 against Yniguez and had sufficiently threatened to do so.<sup>15</sup> Reaching the merits of Yniguez's claim, the U.S. District Court for the District of Arizona ruled that Article 28 was facially broad in violation of the First Amendment.<sup>16</sup> In granting declaratory relief, the district court denied injunctive relief in favor of Yniguez because no enforcement action was pending, and thus the court did not reach the other constitutional issue that Yniguez asserted.<sup>17</sup>

In 1992, "Arizonans for Official English," the principal sponsor of the ballot initiative codified as Article 28, filed a notice of appeal in the district court.<sup>18</sup> The U.S. Court of Appeals for the Ninth Circuit, in an en banc decision, affirmed, reasserting that Article 28 violated the Free Speech Clause of the First Amendment.<sup>19</sup> Again, the court made no reference to a Fourteenth Amendment analysis of Article 28 or English-Only laws in general.<sup>20</sup> The U.S. Supreme Court granted certiorari on the matter

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General had no specific authority to enforce Article 28 against the plaintiff, Yniguez was barred under *Ex Parte Young*, 209 U.S. 123 (1908), from filing an action against him. *Yniguez*, 69 F.3d at 925. Similarly, the district court found that although the Director of the Arizona Department of Administration had authority to exercise Article 28 against Yniguez, the director had not threatened to do so; because of this, the director was dismissed as a defendant as well. *Id.*

15. *Yniguez*, 69 F.3d at 925. The court relied on the fact that "Mofford [the Arizona State Governor] has officially stated that she intends to comply with Article XXVIII and expects state service employees, of which Yniguez is one, to comply with Article XXVIII." *Yniguez v. Mofford*, 730 F. Supp. 309, 312 (D. Ariz. 1990).

16. *Yniguez*, 69 F.3d at 925.

17. *Id.* at 925-26. Specifically, the court focused on and resolved the case on the First Amendment issue, but failed to rule on the constitutionality of the law under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 926.

18. 69 F.3d at 926. It is important to note that, by the time the notice of appeal was filed, Yniguez had resigned from her job as an insurance claimant and was no longer working in the public sector. *Yniguez*, 117 S. Ct. at 1057. The Ninth Circuit, however, did not find that Yniguez's resignation rendered the case moot, because a plea for nominal damages could be read into the plaintiffs' "all other relief" clause to save the case. *Id.*

19. 69 F.3d at 947. Judge Reinhardt expressed his dissatisfaction with the seemingly unlimited scope of Article 28 and stated:

This broad language means that Article XXVIII on its face applies to speech in a seemingly limitless variety of governmental settings, from ministerial statements by civil servants at the office to teachers speaking in the classroom, from town-hall discussions between constituents and their representatives to the translation of judicial proceedings in the courtroom. Under the article, the Arizona state universities would be barred from issuing diplomas in Latin, and judges performing weddings would be prohibited from saying "Mazel Tov" as part of the official marriage ceremony.

*Id.* at 932.

20. *Id.* at 947. Further, in rendering its decision, the Ninth Circuit declined to certify the matter of Article 28's interpretation and constitutionality to the State Supreme

on March 25, 1996,<sup>21</sup> and was expected to render a decision on the constitutionality of Article 28 by the summer of 1997.<sup>22</sup> However, the Court never made a decision based on either the First or Fourteenth Amendment.<sup>23</sup> The highly politicized nature of English-Only laws as an immigration and economic issue and the fact that Yniguez's particular circumstances raised standing and mootness issues afforded the Court an opportunity to dismiss the case based on Article III and to turn a deaf ear to the constitutional questions raised.<sup>24</sup> In the end, the Supreme Court

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Court. *Yniguez*, 117 S. Ct. at 1057. Moreover, although the Ninth Circuit acknowledged a state court challenge to Article 28's constitutionality, *Ruiz v. Symington*, No. 1 CA-CV 94-0235, 1996 WL 309512, at \*1 (Ariz. App. Aug. 1, 1996), it found that litigation to be no cause to stay the federal proceedings. *Yniguez*, 117 S. Ct. at 1057.

21. 116 S. Ct. 1316 (1996). The Supreme Court asked the parties to brief and argue two issues in addition to the First and Fourteenth Amendment issues raised below. The first issue was whether the private group appealing had standing to maintain the action since the State of Arizona had not appealed the Ninth Circuit decision. The second issue was whether there was a case or controversy with respect to Maria-Kelly Yniguez, the respondent in the case. *Supreme Court Grants Certiorari in English Only Cases*, WEST'S LEGAL NEWS, March 27, 1996, available in WESTLAW, 3-27-96 WLN 2647.

22. *Despite Looming U.S. Supreme Court Decision, Sharply Divided House Passes English-Only Bill*, WEST'S LEGAL NEWS, Aug. 7, 1996, available in WESTLAW, 8-7-96 WLN 8157.

23. Finding the case moot, the court vacated the Ninth Circuit's judgment and remanded the case with directions that the district court dismiss the action; in doing so, the Court refused to interpret Article 28 or come to a decision as to its constitutionality. *Yniguez*, 117 S. Ct. at 1057-58. The Court's ruling came as no surprise to many skeptical authorities who predicted that the U.S. Supreme Court would avoid deciding the case on its merits. Robert Marquand & Miriam Davidson, *Court Lends Ear On 'English Only' Case May Shape How States Conduct Business*, CHRISTIAN SCI. MONITOR, Dec. 5, 1996, at 1; *English-Only Case Unravels in Supreme Court Hearing: Justices Sidestep Issue to Focus on Procedure*, BALTIMORE SUN, Dec. 5, 1996, at 16A; Steve Lash, *First Amendment English-Only Case Becomes High Court Debate on Standing*, WEST'S LEGAL NEWS, Dec. 5, 1996, available in WESTLAW, 12-5-96 WLN 12997; David G. Savage, *High Court's 'English-Only' Case Boils Down to Legalese*, L.A. TIMES, Dec. 5, 1996, at A30; Jan Crawford, *Justices Back Away From Language Case: Appeal of 'English-Only' Law May Not Belong Before Supreme Court*, CHI. TRIB., Dec. 5, 1996, at 10; Aaron Epstein, *Procedural Snags Impair Debate of English-Only Laws*, DAYTON DAILY NEWS, Dec. 5, 1996, at 8A; *Technicalities Keep Court From Ruling on English Law*, ARIZ. DAILY STAR, Dec. 5, 1996, at 1A; Roger K. Lowe, *Top-Court Case May Be Lost in Legalese*, COLUMBUS DISPATCH, Dec. 5, 1996, at 3A.

24. *Yniguez*, 117 S. Ct. at 1057-58. This result could have been easily predicted from the initial arguments in the case on December 4, 1996. United States Supreme Court Official Transcript, 1996 WL 711210, *Arizonans for Official English v. Arizona*, 116 S. Ct. 1316 (1996) (No. 95-974). There, the United States Supreme Court focused on standing and mootness issues and made little mention of the First and Fourteenth Amendment issues. *Id.* In rendering its decision a few months later, the Court found that Yniguez no longer satisfied the case or controversy requirement; the Court found that the plaintiff's resignation from the public sector to work in the private sector mooted her case since her speech in the private sector was no longer governed by Article 28. *Yniguez*, 117 S. Ct. at 1057-58. The Court noted that an actual controversy must be ex-

again sidestepped the question of the constitutionality of English-Only laws.

Nevertheless, while technically presenting only a First Amendment claim, *Yniguez* raises broader issues regarding prejudice against non-English speakers and discrimination based upon national origin and race that are bound to be raised again.<sup>25</sup> Although the courts have chosen to focus on the First Amendment constitutional issue in rendering their decisions,<sup>26</sup> this Case Note will examine the arguments for and against English-Only legislation in the context of an equal protection analysis.

This Case Note will analyze Arizona Constitution Article 28, under the standards associated with the Equal Protection Clause of the Fourteenth Amendment. The Case Note will argue that English-Only laws are not narrowly tailored to satisfy the proffered state interests as required under the Fourteenth Amendment's strict judicial review standard. A parallel distinction will be made with regard to national origin and race discrimination and Article 28. In doing so, the state's interest in encouraging linguistic unity and curtailing public cost will be set against the non-English speakers' interest in protecting their cultural heritage and in keeping access to the government open to all persons regardless of their particular language fluency. Part II of the Case Note will put the Fourteenth Amendment's Equal Protection Clause into perspective, focusing on two lines of cases that illuminate the clause. Part III of the Case Note will analyze Article 28 under the strict scrutiny standard involving national origin and race discrimination discussed in Part II. Part IV concludes that English-Only laws, generally, and Article 28, specifically, violate the Equal Protection Clause because there is no close fit between the state's objective and its legislation and because education is a less restrictive alternative to English-Only laws.

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tant at all stages of review, and not just when the complaint is filed in order for a case to qualify for federal court adjudication. *Id.* at 1057-58.

25. Martina Stewart, Note, *English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539, 539 (1996).

26. *Yniguez*, 69 F.3d at 947.



## II. HISTORY OF THE EQUAL PROTECTION CLAUSE: ENGLISH-ONLY LAWS PERPETUATE DISCRIMINATION OF A SUSPECT CLASS IDENTIFIED BY LANGUAGE AND SHOULD BE SUBJECT TO STRICT JUDICIAL REVIEW

Although the constitutions of many nations contain official-language provisions,<sup>27</sup> the U.S. Constitution contains no such provision.<sup>28</sup> In fact, since the nation's inception and during most of its early history, repeated efforts to establish a monolingual New World were consistently defeated.<sup>29</sup> The colonies were, in essence, multilingual territories, and German, French, and hundreds of American Indian and other languages were widely spoken.<sup>30</sup> This multilingual community, however, did not last long. The increased and prolonged immigration from Southern and Eastern Europe during the end of the nineteenth century and the beginning of the twentieth century created a backlash of anti-immigrant sentiment that manifested itself in the laws of this country.<sup>31</sup> Although this backlash lessened with the passing

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27. Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 296 (1989).

28. See U.S. CONST. This is true despite the fact that two out of three Americans erroneously believe that English is the official language of the United States. Califa, *supra* note 27, at 293.

29. Califa, *supra* note 27, at 296. For example, early colonists defeated an attempt to create a language academy that would have set standards for proper English and, in essence, would have established English as the primary language. *Id.*

30. *Id.* In fact, German was widely spoken throughout the nation. *Id.* At the time, Pennsylvania was one of several states that published its laws in both English and German. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 305 (1992). The increased use of German among the colonies led the Commissioner of Education to note that German had "actually become the second language of our Republic, and a knowledge of German is now considered essential to a finished education." Califa, *supra* note 27, at 297. Moreover, the Continental Congress translated many official publications into German and French to communicate with the non-English-speaking colonial residents. Brief of Amici Curiae United States Representative Nydia M. Velasquez, Congressional Hispanic Caucus, Congressional Asian Pacific American Caucus, National Association of Latino Elected and Appointed Officials, and 32 Individual Members of the United States Congress as Amici Curiae in Support of Respondents at 22, *Yniguez* (No. 95-974), available in 1996 WL 418711. During the Revolutionary War, the Continental Congress even used German to persuade colonial German speakers to fight against Britain. *Id.* at 23. The Continental Congress also published the Articles of Confederation in both German and French; the Articles were translated to French in an attempt to encourage Quebec to join the new nation. *Id.*

31. Califa, *supra* note 27, at 297. At the time, under the guise of "Americanization," new laws were passed throughout the country requiring English proficiency for employment, voting, and education. *Id.* Moreover, in 1906, federal law imposed the requirement that aliens speak English in order to become naturalized citizens; the rationale was

of the decades, recent and steady increases in immigration, especially from Asian and Latin-American countries, have resurrected ideology implicating racism and nativism<sup>32</sup> thought dealt with long ago.<sup>33</sup> Xenophobia of the magnitude experienced many decades ago has reappeared today and movements demanding national monolingualism have gained strength.<sup>34</sup>

Generally, the courts have dealt with this xenophobia concerning federal language rights through two lines of precedent.<sup>35</sup> The first line of precedent establishes the principle that language discrimination can be a proxy for national origin discrimination.<sup>36</sup> In these cases, the Supreme Court upheld the right of individuals to use foreign languages in spite of restrictions imposed by earlier statutes similar to Article 28.<sup>37</sup> These cases applied the Fourteenth Amendment's Equal Protection Clause to the issue of language rights and struck down laws prohibiting the use of languages other than English in certain situations.<sup>38</sup> One such case, *Meyer v. Nebraska*,<sup>39</sup> concluded that a statute that prohibited the teaching of any subject to any grade below the eighth grade in any language other than English violated the Fourteenth Amendment.<sup>40</sup> In rendering its decision, the U.S.

that such a requirement would improve the "quality" of naturalized citizens. Perea, *supra* note 30, at 337. The Commission on Naturalization of 1905 expressed the popular view: "[T]he proposition is incontrovertible that no man is a desirable citizen of the United States who does not know the English language." *Id.*

32. "Nativism" has been defined as an historical development that embodies xenophobia and a sense of the superiority of the Anglo-American over all other racial and ethnic groups. TATALOVICH, *supra* note 3, at 5.

33. *Id.*

34. *Id.* It is important to note that when the organization U.S. English was established in 1983, only a small cadre of activists promoted English-Only legislation at the state level; today, U.S. English is a grassroots movement with a reported membership of 450,000 promoting English-Only laws in state and federal legislatures. *Id.* at 10-16.

35. Stewart, *supra* note 25, at 545.

36. Perea, *supra* note 30, at 357.

37. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a state law that prohibited the teaching of any language other than English to a child who had not yet finished the eighth grade because the law violated the Fourteenth Amendment); *Bartels v. Iowa*, 262 U.S. 404 (1923) (invalidating a state law that prohibited the teaching of any language other than English to a child who had not yet finished the eighth grade because the law violated the Equal Protection Clause of the Fourteenth Amendment); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (invalidating a law that prohibited Chinese merchant immigrants from keeping their financial books in Chinese and denied equal protection under the law).

38. See *Meyer*, 262 U.S. at 390; *Bartels*, 262 U.S. at 404; *Yu Cong Eng*, 271 U.S. at 500.

39. 262 U.S. 390 (1923).

40. *Id.* at 399-403.

Supreme Court alluded to the constitutional protection that the Fourteenth Amendment affords all persons, English and non-English speakers alike:

The protection of the Constitution extends to all; to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.<sup>41</sup>

The cases in the first line of precedent were, in effect, early U.S. Supreme Court decisions that concluded prohibitions on the use or teaching of non-English languages constituted deprivations of liberty under the substantive due process doctrine accepted at the time.<sup>42</sup> Yet, despite being based on the substantive due process doctrine of the 1920s, these cases have continuing validity.<sup>43</sup> In fact, in 1991, the U.S. Supreme Court cited these cases to support the proposition that language can be a proxy for race for purposes of an equal protection analysis.<sup>44</sup>

The second, more recent, line of cases have denied non-English speakers the right to state services in their native languages.<sup>45</sup> These cases established the principle that "language, by itself, does not identify members of a suspect class" for purposes of an equal protection analysis.<sup>46</sup> The focal point of the courts' conclusions in these cases was that the state would suffer significant economic burdens if it were saddled with the requirement of providing government services in languages other than English.<sup>47</sup> Yet, despite this second line of cases, the courts

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41. *Id.* at 401.

42. Perea, *supra* note 30, at 356 n.474 (citing *Yu Cong Eng*, 271 U.S. at 528; *Meyer*, 262 U.S. at 403).

43. *Id.* at 358.

44. *Hernandez v. New York*, 500 U.S. 352, 352-79 (1991).

45. Stewart, *supra* note 25, at 546.

46. *Id.* at 546 & n.67 (citing *Soberal-Perez v. Heckler*, 717 F.2d 35, 41 (2d Cir. 1985) (court found the plaintiff had no right to social security services or forms in Spanish); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (court found the plaintiff had no right to civil service exam in Spanish)).

47. Stewart, *supra* note 25, at 546. It is important to note that although two lines of precedent focused on the Fourteenth Amendment and federal language rights, see *supra* Part II, the overall effect of the statutes/holdings involved in both lines of precedent do not equate with the overall effect of Article 28. As stated in the text, there is a second

have recognized that language discrimination can be a proxy for national origin discrimination for purposes of an equal protection analysis.<sup>48</sup>

In *Hernandez v. New York*,<sup>49</sup> Justice Kennedy, writing for the plurality, stated in dicta that language discrimination and race/national-origin discrimination can be one and the same.<sup>50</sup> Establishing the link between language, race, and the Fourteenth Amendment, Justice Kennedy wrote: "It may well 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."<sup>51</sup> In interpreting Title VII of the Civil Rights Act of 1964, the Court found that discrimination on the basis of language can be forbidden as a type of discrimination based on national origin.<sup>52</sup> Similarly, the Equal Employment Opportunity Commission's regulations also acknowledged the nexus between language and national origin discrimination, prohibiting discrimination against a person simply because he/she possesses the "physical, cultural, or linguistic characteristics of a national origin

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line of precedent developed in the latter half of the century that effectively states that courts cannot use language to identify suspect classes. See *supra* Part II. This line of cases involves affirmative rights. Stewart, *supra* note 25, at 548. Further, this line of cases is not applicable in a Fourteenth Amendment analysis of Article 28 and most English-Only laws. Article 28 questioned the use of a negative right. Yniguez was not seeking that the government hire Spanish-speaking employees to deal with non-English-speaking claimants; on the contrary, the plaintiff was only seeking that the government allow the public employees, already hired, to make use of the skills and talents they already possessed (i.e. second-language skills) without the fear of reprimand. Yniguez, 69 F.3d at 924. As a result, Yniguez, much like the plaintiffs in the cases in the first line of precedent, was seeking enforcement of a negative right. The fight for a negative right is to be distinguished from a fight for an affirmative right as in the second line of precedent. Stewart, *supra* note 25, at 548. In those cases, the plaintiffs sought the affirmative right of having the government hire Spanish-speaking employees or of providing forms in languages other than English. See *Soberal-Perez v. Heckler*, 717 F.2d 35, 41 (2d Cir. 1985); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975). Satisfying the affirmative rights in these cases, unlike satisfying the negative rights in Yniguez, would have imposed substantial burdens on the state since the government would have had to proactively seek or apply non-English-speaking employees or non-English forms. Stewart, *supra* note 25, at 546. Thus, since Yniguez concerns itself with negative rights and the second line of precedent involves affirmative rights, the second line of cases is not applicable to and is distinguishable from statutes such as Article 28 and cases such as Yniguez.

48. Perea, *supra* note 30, at 357.

49. 500 U.S. 352 (1991).

50. *Id.* at 371-72.

51. *Id.*

52. Perea, *supra* note 30, at 358.

group.”<sup>53</sup> Moreover, statistics have demonstrated the connection between language and national origin as well as the fact that language can be a proxy for national origin.<sup>54</sup> A 1984 study found that ninety-seven percent of Spanish speakers are of Hispanic origin; similarly, about seventy-seven percent of American Hispanics speak Spanish.<sup>55</sup> Professor Juan F. Perea interprets these statistics to show “how close a fit language discrimination can be for discrimination because of national origin.”<sup>56</sup> Hence, drawing in large part from the substantive due process analysis of the cases in the first line of precedent as well as from modern day court interpretations, agency regulations, and statistics, modern law has come to acknowledge that certain classifications based on language or language ability, such as English-Only laws, may violate the Equal Protection Clause.<sup>57</sup>

It is well established that state action based on race or national origin violates the Fourteenth Amendment's Equal Protection Clause<sup>58</sup> and is subject to strict scrutiny.<sup>59</sup> Therefore, as a logical result from the conclusion that language discrimination can equal national origin discrimination, legal commentators contend that English-Only laws like Article 28 should be subjected to a heightened form of scrutiny as an invidious classification based on national origin.<sup>60</sup> These legal commentators conclude that English-Only laws use language as a proxy for unpopular national origin and, as a result, should be subjected to more intense scrutiny than that provided by the rational basis test.<sup>61</sup> Such an analysis of English-Only laws is based on the

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53. *Id.* at 359.

54. *Id.*

55. *Id.*

56. *Id.* at 359-60.

57. *Id.* at 356.

58. *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

59. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

60. Perea, *supra* note 30, at 356-57. Perea states that “[c]ourts should subject discriminatory state action based on language, because of its inextricable relationship to ethnicity and national origin, to heightened scrutiny and should find it unconstitutional.” *Id.* at 360.

61. *Id.* at 357. These legal commentators are calling for standards of review that would impose upon the state a higher burden than showing that the proposed law is rationally related to some state interest. *Id.* At this point, it is probably best to note that a challenged government action is subject to one of three levels of scrutiny: 1) “Strict scrutiny” is the highest level of scrutiny and applies if the action intentionally discriminates against a “suspect” class (i.e. national origin) or infringes a fundamental right. Under such a test, the government’s burden is practically insurmountable; state action must be narrowly tailored to a compelling government interest and there must be no less restric-

contention that statutes calling for governmental monolingualism are based on unconstitutional motivations such as nativism, and lead to the creation of a second-class citizenship for all Americans whose primary language is not English.<sup>62</sup> Although such an analysis is novel in that the courts have never analyzed language discrimination by use of an English-Only law in conjunction with a strict scrutiny standard of review, many consider it to be long overdue.<sup>63</sup>

### III. ANALYSIS OF ENGLISH-ONLY LAWS UNDER NATIONAL ORIGIN DISCRIMINATION STANDARD: ENGLISH-ONLY LAWS ARE NOT NARROWLY TAILORED TO SATISFY A COMPELLING STATE INTEREST

Analyzing Article 28 under strict scrutiny judicial review, the state action must be narrowly tailored to accomplish a compelling state interest, and there must be no less restrictive classification that would achieve the purpose.<sup>64</sup> Proponents of English-Only laws contend that Article 28 satisfies four compelling state interests: 1. English-Only laws will encourage Hispanics and other non-English-speaking minorities to learn English; 2. English-Only laws are narrowly tailored to the state interest of government efficiency; 3. English should be declared the official language before Spanish is declared official; and 4. Absent a declaration of English as the official language of the nation, the United States will suffer linguistic discord and separatism as has plagued other bilingual countries.<sup>65</sup> Arguably, the four state interests are not satisfied by the legislation proffered in Article 28. The proposed means are not narrowly tailored to compelling state objectives, but rather are juxtaposed to those interests.

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tive classification that would achieve the purpose; 2) "Heightened scrutiny" is the intermediate level of scrutiny and applies if the action intentionally discriminates on the basis of gender, alienage, or illegitimacy. Under this test, the government must show a substantial relation between the state action and an important governmental interest; and 3) The "rational-basis test" is the lowest level of scrutiny and is the test for social and economic regulation involving no suspect or quasi-suspect classes nor any fundamental rights. Under this test, the classification must be rationally related to a legitimate governmental interest in order to satisfy the Equal Protection Clause. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 595-610 (5th ed. 1995).

62. Perea, *supra* note 30, at 357.

63. *Id.* at 350-71; See generally Califa, *supra* note 27.

64. See NOWAK & ROTUNDA, *supra* note 61, at 595-610.

65. Califa, *supra* note 27, at 312. Christopher Swope, *Panel Oks Bill to Make English Official Government Language*, 54 CONG. Q. 2128 (1996).

Moreover, increased English-language education, as opposed to English-Only legislation, will be a less restrictive classification. This less restrictive classification would achieve the same objectives without the imposition of a state constitutional amendment that discriminates by using language as a proxy for disfavored national origin and in the process violates the Equal Protection Clause.<sup>66</sup>

*A. English-Only Laws will not Serve the State Interest of Encouraging Hispanics and Other Non-English-Speaking Minorities to Learn English*

Proponents of English-Only laws believe that recent immigrants are not learning English.<sup>67</sup> They cite the fact that the majority of immigrants speak only Spanish and herald that recent immigrants are unwilling or unable to learn English.<sup>68</sup> As a result, English-Only legislation is seen as a panacea to "force" non-English-speaking immigrants to learn English.<sup>69</sup> The protected government interest is the encouragement of monolingual unity. However, recent statistics and studies undermine the reasoning behind these objectives.

A recent study showed that Hispanics and most other non-English-speaking minorities conform to the classic three-generation model of language acquisition.<sup>70</sup> According to the model, the first generation is mainly monolingual in Spanish or other foreign language.<sup>71</sup> The second generation is bilingual and has a working understanding of both English and a foreign/second language.<sup>72</sup> The third generation prefers English

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66. It is important to note that, for purposes of this analysis, the assumption that the interests proffered by English-Only law supporters are indeed compelling has been accepted as true. This point is highly arguable. Nevertheless, this Case Note rests on the argument that, even if the stated objectives are compelling, the discriminatory effect resulting from the implementation of English-Only laws as a means to achieve those objectives far outweighs any benefit. This shows that the means (English-Only laws) are not narrowly tailored to the ends (proffered and alleged compelling interests). Therefore, such laws violate the Equal Protection Clause of the Fourteenth Amendment.

67. Califa, *supra* note 27, at 312-13.

68. *Id.* at 313-14.

69. *Id.*

70. *Id.* at 314-15.

71. *Id.* at 314.

72. *Id.*

over the language of the home country.<sup>73</sup> This study has led to the conclusion that the language shift from Spanish, or any other foreign language, to English spans two to three generations, and that a two-generation model is more likely in the future.<sup>74</sup> According to such models, without continued immigration, Spanish and other foreign languages would not survive in the United States, given a majority of immigrants' pace of learning English.<sup>75</sup> Thus, any fears that non-English-speaking immigrants are reluctant or incapable of learning English are unfounded. Non-English-speaking immigrants are learning English without any legal coercion. Non-English-speaking immigrants are aware of the social and economic importance of learning to speak English, and are in fact doing so.<sup>76</sup> The demand to learn English is so great that non-English speakers are on waiting lists to enter English study classes.<sup>77</sup>

In light of these findings, the alleged compelling state interest of encouraging non-English speakers to learn English will be better satisfied by increasing the number of English study classes available to immigrants instead of encouraging English-Only legislation. Increased education not only is less restrictive but also should prove more beneficial to the proffered state objective. English-language education, instead of English-Only legislation, will bypass the invidious discrimination inherent in using language as a proxy for national origin and, at the same time, will serve the attempted objective of reaching national linguistic unity. Viewed in this light, English-Only legislation is not narrowly tailored to the proposed government objective; the remedy offered by English-Only legislation (i.e. discrimination against non-English speakers) is broader than the scope of the violation (i.e. multilingual society). A less restrictive means, in

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73. *Id.*

74. *Id.* at 315-16.

75. *Id.* at 316.

76. Ninety-eight percent of Hispanics believe it is imperative that their children learn to speak, read, and write English very well. *Id.*

77. Statistics show that there are long waiting lists of immigrants wishing to study English. *English As Official Language: Hearings on S. 356 Before the Senate Comm. on Governmental Affairs*, 104th Cong. (1996) (testimony of Karen K. Narasaki, Executive Director, National Asian Pacific American Legal Consortium), available in 1996 WL 7135994, at \*1.\*2. In 1994, about 5000 immigrants were turned away from "English As A Second Language" classes in Washington, D.C. for lack of available student openings. *Id.* New York schools resorted to a lottery system to decide enrollment in English classes. *Id.* Los Angeles schools are also plagued with lists of 40,000 to 50,000 immigrants who wish to enroll in English study courses. *Id.*



the form of increased education, will serve to reach the desired end without resulting in invidious discrimination. As a result, in analyzing this particular interest (i.e. encouraging non-English-speaking minorities to learn English), English-Only legislation fails strict scrutiny and violates the Equal Protection Clause of the Fourteenth Amendment.<sup>78</sup>

Moreover, in light of the three-generation model<sup>79</sup> and in light of the fact that nearly 100% of Hispanics believe learning English is essential for their children,<sup>80</sup> the parallel argument that bilingual education or ballots serve as disincentives to learning English is unconvincing. The truth is that individual immigrants learn English in conformance to their age and time spent in the United States.<sup>81</sup> The elimination of bilingual ballots or education, by the implementation of Article 28, or any other English-Only legislation, will not aid immigrants language acquisition any quicker.<sup>82</sup>

English-Only ballots will only serve to disenfranchise immigrants and will result in less governmental participation by mi-

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78. It is clear that English-Only legislation will not survive strict judicial review when the government objective used to justify the unequal discrimination is lingual unity. It is equally clear though that such an objective may pass a lower level scrutiny under the Fourteenth Amendment. It can be effectively contended that, as a means to an end, English-Only laws are rationally related to the intended objective of lingual unity. However, since there is a strong inference that non-English speakers affected by English-Only laws make up a suspect/national-origin class based on language, it is highly unlikely the lowest level scrutiny is the most appropriate standard to be applied in this instance.

79. Califa, *supra* note 27, at 314-15.

80. See Perea, *supra* note 30, at 314.

81. The Veltman Study found that Hispanics' proficiency in learning English is determined by two factors: 1) how long the immigrant has lived in the United States; and 2) how old the immigrant was when he/she arrived in the United States. Califa, *supra* note 27, at 314-15. The study noted that older adolescents and adults do not learn English as quickly as younger immigrants. *Id.* Yet, the language shift does occur usually within three generations. *Id.*

82. The Linguistic Society of America and the National Council for Language and International Studies have come to the conclusion that

Article 28 will not further the state's asserted interest in promoting a common language. Immigrants are learning English in much the same way and at the same rate as they did in the past. What determines how quickly immigrants learn English is the age at which they arrive in this country, the length of time they have been here, the quality of the State's educational system, and other factors over which Article 28 exerts no control.

Brief of Amici Curiae Linguistic Society of America and National Council for Languages and International Studies in Support of Respondents at 7, *Yniguez* (No. 95-974), available in 1996 WL 413764.

norities.<sup>83</sup> Similarly, English-Only education will hinder immigrant students' transition to their learning in English.<sup>84</sup> Studies have concluded that native language instruction helps students perform better in subjects like math and science and aids in their transition to English instruction.<sup>85</sup> The absence of such native-language education could lead to a generation of second-class students who will have difficulty not only in learning to speak English but also in understanding academic concepts. Thus, in terms of voting and education, it appears that, once again, increased education, not enforced English-Only legislation, will better serve the state's long-term objectives.

Neither disenfranchisement nor monolingual schooling by use of English-Only laws will work to encourage English monolingualism; only increased educational opportunities and time will do that. Prohibiting bilingual ballots and bilingual education by implementing English-Only laws is not a means narrowly tailored to the alleged compelling objective of English-centered monolingualism. Such a law will not encourage non-English speakers to learn the language. Such a law will only succeed in disenfranchising non-English speakers and hinder their educational process. This effect is discrimination based on suspect class characteristics because it is contendable that language skills (or rather lack of English-language skills) is a proxy for identifying different national-origin groups. These laws are unconstitutional, not only because the invidiously discriminatory effect of the laws outweighs the alleged interest, but also because education can be identified as a less restrictive means of achieving the same proffered objective. As a result, English-Only laws fail strict judicial review under the alleged interest of encouraging non-English speakers to learn English.<sup>86</sup>

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83. In fact, opponents of English-Only laws state that the ulterior purpose of such laws is to strip minorities of their voting power. Califa, *supra* note 27, at 317.

84. *Id.* at 318.

85. *Id.*

86. It is important to note that a rational basis review of English-Only laws under this objective might pass constitutional muster. However, given the fact that, once again, language is used to identify and discriminate against a suspect class, application of such low-level scrutiny would be improper.

*B. English-Only Laws are not Narrowly Tailored to the State Interest of Government Efficiency*

Proponents of English-Only legislation argue that the purpose of the amendment is to foster unity within individual communities and within the nation as a whole. However, they also argue that the amendment will persuade non-English speakers to learn English and will curtail the expense incurred by the government in supplying individuals with information or documents in foreign languages.<sup>87</sup> Proponents of English-Only legislation note that the Internal Revenue Service is printing 500,000 tax forms in Spanish only to have fewer than 1000 returned;<sup>88</sup> they claim that such multilingualism in government affairs is highly inefficient. Opponents of English-Only laws counter this claim by noting that over five years only 265 documents out of 40,000 released by the Government Printing Office are released in foreign languages<sup>89</sup> and that only .06% of federal documents are printed in languages other than English.<sup>90</sup> They argue that English-Only laws will not provide the least expensive, most efficient alternative to achieve government efficiency as would satisfy strict scrutiny.

Article 28, like most state English-Only laws, prevents government employees, even if they speak a second language, from communicating in any language other than English while on the job. This law does not promote efficiency, especially when the citizens that government employees are aiding are non-English speakers. The law effectively prohibits employees from using a skill already learned that can significantly increase their productivity and effectiveness in aiding patron citizens. Prevented from communicating in the foreign language they already know how to speak, government workers, muzzled under English-Only legislation, actually increase costs and delay services that citizens, even non-English-speakers, are entitled to. As a result, foreign-language speakers are deprived temporarily, if not permanently, of government services and information. This leads to

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87. Swope, *supra* note 65.

88. *Id.*

89. *Id.*

90. *English As Official Language: Hearings on S. 356 Before the Senate Comm. on Governmental Affairs*, 104th Cong. (1996) (statement of Juan F. Perea, Professor Of Law, University of Florida College of Law, Gainesville, Fla.), available in 1996 WL 5510006, at \*41-42.

increased opportunity costs, not only to patron citizens, but also to the government because government workers will be barred from timely completing their jobs and thus government business will be stifled and delayed. In view of such a result, it is doubtful that English-Only laws are narrowly tailored to the interest of government efficiency. Instead, these laws appear to be more narrowly tailored to government inefficiency. Thus, the invidious classification of minorities based on language fluency is not justified by an alleged interest in state efficiency. Even assuming that efficiency is a compelling state interest, English-Only laws do not promote efficiency, and therefore, the state interest is not satisfied. Thus, the efficiency argument for English-Only fails strict scrutiny analysis and constitutes a violation of the Fourteenth Amendment.

*C. There is No Evidentiary Proof to Support the Argument that English Should be Declared the Official Language Before Spanish is Declared Official*

In light of the fact that there are and have been no movements to establish Spanish or any other foreign language<sup>91</sup> as the official language of the nation, the contention that an English-Only law should be passed to assuage such a fear is sheer paranoia and nothing short of absurd. Not one Hispanic organization believes that Spanish should be the country's official language.<sup>92</sup> On the contrary, Hispanics and other non-English-speaking minorities living in the United States have embraced the English language.<sup>93</sup> English has become the only universal language and is used daily for easy communication between people speaking different languages and coming from different cultures.<sup>94</sup> The thought that its eminence could be replaced is nothing more than a scare-tactic employed by English-Only proponents.<sup>95</sup>

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91. See Califa, *supra* note 27, at 321.

92. *Id.*

93. *Id.* This is supported by the three-generation model developed in the Veltman Study. *Id.* at 314-15.

94. *Id.* at 322.

95. *Id.*

Establishing English-Only laws will not make English any more widely spoken in the United States. Therefore, the implementation of English-Only laws is not a narrowly tailored means of reaching the alleged compelling interest of having English as the official language; no compelling state interest will be served, and strict judicial review is not satisfied. Again, educating more non-English speakers through increased English study programs would better serve the state objective of increasing English use and would undoubtedly be a less restrictive means of achieving that goal.<sup>96</sup>

*D. There is no Evidence that, Absent a Declaration of English as the Official Language of the Nation, the United States will Suffer Linguistic Discord and Separatism as has Plagued Other Bilingual Countries*

Advocates of the English-Only movement contend that, absent a declaration of English as the official language, the nation will degenerate into a bilingual separatism of the likes of countries such as Canada, Sri Lanka, and Belgium.<sup>97</sup> They believe that bilingualism will lead to civil strife and disunity of the nation.<sup>98</sup> The truth is that the problems plaguing Canada and the other countries mentioned are very different from the problems affecting the United States.<sup>99</sup> Canada, Sri Lanka, and Belgium are distinguishable from the United States in that these countries have developed with specific geographic regions where different languages have been spoken;<sup>100</sup> the same cannot be said of the United States—a country founded on a “melting pot” theory where immigrants and their different cultures and languages were traditionally welcomed and, for the most part, spread out throughout the country. Since its beginnings, the United States has not been divided into regions where specific languages other

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96. As in the last two proffered objectives, English-Only laws are not narrowly tailored to achieve the compelling state interest of preventing a foreign language from being declared the official language of the country; instead English-Only laws result in invidious classifications. Nevertheless, English-Only laws may be rationally related to the state objective of declaring English the official language; thus, under a rational-basis standard, English-Only legislation may be constitutional.

97. Califa, *supra* note 27, at 322-23.

98. *Id.*

99. *Id.*

100. *Id.*

than English were spoken. Thus, it seems farfetched to suggest that these countries are a prophetic example of what awaits the United States in the future.

However, even if one assumes the parallel drawn between Canada, Sri Lanka, Belgium, and the United States, it is doubtful that English-Only laws could be a viable antidote to any future linguistic disparity within the United States. Instead, Canada, Belgium, and Sri Lanka are prime examples of how "divisiveness and discord is more likely when one language is declared official to the disadvantage of speakers of another language."<sup>101</sup> Arguably, establishing English-Only laws and thereby sanctioning discrimination against an entire language group in the name of national unity will only serve to label immigrants as being inferior and un-American, and will only be to the disadvantage of them; it is this type of high sentiment, prejudice, and statements that have led to the civil discontent of countries like Canada, Belgium, and Sri Lanka. The fact that we live in a society with many forms of expressing ourselves is not a sign of bilingual separatism, and it never will be; it is a form of lingual and cultural pluralism. To do away with lingual and cultural pluralism via language restrictions in the name of national unity will beget social discontent among non-English speakers, and it is those precise movements to quash one language for the benefit of another that have caused all the problems in Canada, Belgium, and Sri Lanka.<sup>102</sup>

This line of reasoning has led many opponents of English-Only laws to conclude that English-Only laws such as Article 28 are fueled by cultural insecurity and prejudice against Hispanics and other non-English-speaking minorities and not by any com-

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101. *Id.* In 1969, Canada declared English and French its official languages. Brief for Respondent Maria-Kelly Yniguez at 42, *Yniguez* (No. 95-974), available in 1996 WL 426410. Five years later, a French-speaking provincial majority declared French the exclusive language of Quebec; they considered the English-speaking minority to be a threat. *Id.* The establishment of French as the official language resulted in more restrictive language laws and increased divisiveness among language groups. *Id.* As a result, "Canada's experience with official language movements suggests that divisiveness and discord are more likely when a single language is declared official." *Id.* The same can be said for the countries of Belgium and Sri Lanka. In 1956, the Seshalese-speaking majority of Sri Lanka decided to make their language official; this instigated a bloody resistance from the Tamil minority. Califa, *supra* note 27, at 323. Similarly, in Belgium, the violence of divisiveness resulted from the French-speakers' intolerance of their Dutch-speaking compatriots. *Id.*

102. Califa, *supra* note 27, at 323.

PELLING state interest;<sup>103</sup> they propose that Article 28 was written with an ulterior motive and discriminatory intent against non-English-speaking minorities and is an example of xenophobia, not an attempt at pluralistic unity.<sup>104</sup> Therefore, once again, it seems to be highly questionable whether there is a close fit between English-Only laws and the proffered compelling state interest. Instead, it seems more likely that the invidious and discriminatory effect of English-Only laws is greater than the intended effect of the proposed objective. State action is not narrowly tailored to a compelling government interest and, again, English-language education offers a less restrictive means by which the same purpose can be achieved.<sup>105</sup>

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103. For example, consider the comments made by Antonio Califa:

The English-Only movement is fueled by cultural insecurity and prejudice against Hispanics. The leaders of this movement are clearly worried about something else. They are frightened by Hispanic immigration and the possibility that Anglos will lose political dominance. The anti-Hispanic feelings, however, are not motivated entirely by self-interest. Pure prejudice also plays a part. English-Only proponents feel that Hispanics have objectionable cultural traits which are harmful to the country. Cultural insecurity may also underlie the fear that the economy cannot accommodate the large number of Hispanic immigrants who are attracted to the United States.

*Id.* at 347.

104. In the continuation of such an argument, opponents of English-Only often cite to an internal memorandum written by former head of "English-Only," John Tanton:

Gobernar es poblar translates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? ... Can *homo cantraceptivus* compete with *homo progenitiva* [sic] if borders aren't controlled? Or is advice to limit one's family simply advice to move over and let someone else with greater reproductive powers occupy the space? ... Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down! ...

How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with a non-Hispanic influence? ... As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion? ...

We're building in a deadly disunity.

JAMES CRAWFORD, *HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF "ENGLISH ONLY"* 151 (1992).

105. Unlike the last three proffered objectives, this objective would probably not pass the low-level scrutiny offered under rational-basis review. It is highly doubtful that English-Only laws are rationally related to the objective of preventing civil upheaval in the United States. There is no rational relation between such laws and the prevention of civil disparateness. On the contrary, English-Only laws seem to be more rationally related to the instigation of civil disparateness. Under such an analysis, the constitutionality of English-Only laws, even under a low-level, rational-basis review, is dubious.

## IV. CONCLUSION

Because English-Only laws have failed to supply a close fit between the stated objectives and the legislation written into the amendment, and because education is a less restrictive classification that would achieve the same purpose, Article 28 should not survive strict judicial scrutiny and should be found to violate the Equal Protection Clause. No compelling government interest is served by allowing language to discriminatorily act as a surrogate for national origin. Article 28 and other English-Only laws fail to meet the objectives they purport to achieve. English-Only laws do not foster national unity, and they do not encourage immigrants to learn English any sooner. Instead, they only serve to disenfranchise immigrant voters, hinder the public education of immigrant children, and work to divide—not unite—immigrant and Anglo communities.

In studying English-Only laws under a Fourteenth Amendment analysis, it is clear that education is a less restrictive means of fulfilling the same objective—a means that does not wrongly use language as a proxy for unwanted national origins. Through education and increased English-Only study programs, immigrants and nonimmigrants work together in a fashion that embraces pluralistic languages and cultures with the goal of increasing English's eminence in the country without relying on xenophobic fears and prejudices. Under such a method, objective results are met and the Equal Protection Clause is not violated through language discrimination that unfairly connotes national origin.

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\* J.D. Candidate, 1998, University of Miami School of Law. The author would like to thank Professor James D. Wilets for his invaluable help and guidance in preparing this Case Note. This Case Note is dedicated to the author's late grandfather, José Alejandro "Pepe" González (1928-1996)—a Cuban immigrant whose life and struggles inspired the author while writing this Case Note and will undoubtedly continue to inspire her for the rest of her life.