NOTES

Language Minority Voting Rights and the English Language Amendment

Introduction

Legislation making English the official language has appeared at the state and federal levels. On the state level, these "English-only" laws have taken the form of statutes[1] or amendments to constitutions.[2] Of greater consequence, however, is the English Language Amendment (ELA) that has been introduced in three congressional sessions and seeks to make English the official language of the United States.[3]

The purpose of the ELA, its proponents claim, is to protect the status of English as the primary language of the United States[4] and to circumvent what they perceive as a growing language separatism among Americans which is threatening national unity.[5] Opponents of the Amendment believe that the ELA is a veiled attempt, fueled by racism, to deny language minorities[6] their civil rights.[7]

The ELA could affect the voting rights of language minorities.[8]

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1. Four states have statutes declaring English the official language: Illinois, ILL. ANN. STAT. ch. 1, ¶ 3005 (1983); Indiana, IND. CODE § 1-2-10-1 (Supp. 1986); Kentucky, KY. REV. STAT. ANN. § 446.060 (1985); and Virginia, VA. CODE ANN. § 22.1 (1985).

2. Two states have constitutional amendments declaring English the official language: Califorina, CAL. CONST. art. III, § 6; and Nebraska, NEB. CONST. art. I, § 27.

3. An English Language Amendment was proposed in both Houses of Congress in 1981, 1983, and 1985. *See infra* note 51.

4. *See infra* note 53 and accompanying text (statement of former California Senator S.I. Hayakawa).

The 1980 Census revealed that 89.1% of Americans speak only English at home. 1980 CENSUS OF POPULATION AND HOUSING, document PHC80-S1-1, at 14 (March 1982).

5. *See infra* note 53 and accompanying text (statement of former California Senator S.I. Hayakawa).

6. The term "language minority", as defined by Congress, includes those persons who are Asian American, American Indian, Alaskan Natives, or of Spanish heritage. 1975 U.S. CODE CONG. & AD. NEWS 790.

7. *The English Language Amendment: Hearings on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 156 (1984) [hereinafter *ELA Hearings*] (statement of Arnold Torres, Executive Director of the League of United Latin American Citizens).

8. The ELA also calls for a radical change in bilingual education. The Amendment would abolish foreign language instruction in academic classes while allowing only transitional

State and federal governments are currently required to provide bilingual ballots for some language minorities.[9] The Equal Protection Clause of the Fourteenth Amendment[10] is also implicated in the area of language minority voting rights.[11] This Note examines how the ELA would affect these statutory and constitutional laws as they apply to language minority voting rights.

Part I of this Note recounts the history of the English-only movement in the United States. Part II discusses the text and purpose of the ELA. Part III discusses current constitutional and statutory language rights. Part IV examines the ELA's effect on language minority voting rights and the equal protection ramifications of the ELA. This Note concludes that adoption of the ELA would abrogate current statutory and constitutional voting right protections afforded to language minorities.

I. The History of the English-Only Movement

A. A Country Without an Official Language

The United States does not have an official language. The Constitution makes no mention of language at all.[12] This omission was not an oversight, but a conscientious choice on the part of the Framers of the Constitution.[13] The Framers recognized that the establishment of an official language would have some value as a symbol of a common bond among the people of the fledgling nation.[14] However, the Founders questioned the wisdom of establishing an official language because they wanted to attract immigrants.[15] John Marshall, the third Chief Justice of the Supreme Court, stated that there would be an "identity of language throughout the United States," but that identity would not be mandated by law.[16]

The Framers believed that leaving language to individual choice was in keeping with the notions of individual freedom upon which the coun-

instruction in English. *See* H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. S3998-99 (daily ed. Jan. 24, 1985) (text of the ELA) (copy of 1985 version of ELA on file at *Hastings Constitutional Law Quarterly* offices).

9. *See infra* notes 115-116 and accompanying text.

10. U.S. CONST. amend. XIV, § 1.

11. *See infra* notes 131-198 and accompanying text.

12. The Constitution is silent as to an official language, although the fact that it is written in English indicates the language's predominant status among the Framers. See also the discussion of the Framers' intentional omission of an official language, *infra* text accompanying notes 14-17.

13. Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment,* 60 INT'L J. SOC. LANG. 8 (1986).

14. *Id.* at 10.

15. *Id.*

16. Heath, *Language and Politics in the United States,* in LINGUISTICS AND ANTHROPOLOGY: GEORGETOWN UNIVERSITY ROUNDTABLE ON LANGUAGES AND LINGUISTICS 273 (1977) (quoting Chief Justice John Marshall).

try was founded.[17] This belief was apparent early in the nineteenth century when some states routinely published state statutes in languages other than English. In Pennsylvania, where a large number of German immigrants settled, statutes were published in German and English; and in Louisiana, where many French immigrants settled, statutes were published in French and English.[18] In addition, several other states, as well as the federal government, published laws in many Indian languages.[19]

Bilingual education in the Ohio and Pennsylvania school systems also emerged early in the nineteenth century.[20] In Ohio, in regions with a substantial German immigrant population, laws were enacted allowing German to be taught in the schools.[21] In Pennsylvania, a statute provided for the establishment of German schools on an equal basis with English schools.[22] In some of these schools, classes were conducted entirely in German.[23] Wisconsin also accommodated its German population by enacting similar laws.[24] There was little controversy over multilingualism in the United States until the late nineteenth and early twentieth centuries.[25]

B. The Emergence of Nativism

The post-Civil War years saw a sharp increase in the number of European immigrants.[26] From 1860 to 1890, ten million people immigrated to America.[27] These immigrants hailed primarily from the British Isles, Scandinavia, Switzerland, and Holland.[28] Though many of these immigrants were not native English speakers, this wave of immigration engendered little hostility. However, the fifteen million people who arrived between 1890 and 1914 precipitated a different response.[29] These immigrants came from the Eastern and Southern European countries of Russia, Austria, Hungary, and Italy.[30] In addition to not speaking English, these newcomers were ethnically and religiously different from Americans and former immigrants from Northern European countries.

17. Marshall, *supra* note 13, at 11.
18. *Id.*
19. *Id.*
20. Leibowitz, *The Official Character of Language of the United States: Literacy Requirements for Immigration, Citizenship and Entrance Into American Life,* 15 AZTLAN 25, 29-30 (1984).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Heath, *English in Our Nation's Heritage,* in LANGUAGE IN THE U.S.A. 6, 7 (1981).
26. Leibowitz, *supra* note 20, at 30.
27. *Id.*
28. *Id.*
29. *Id.* at 30-31.
30. *Id.* at 30.

These differences gave rise to a xenophobia "reflecting a newly defined ethnocentricity."[31] The high concentration of immigrants in the cities[32] created additional difficulties because of the shift in the economy from agricultural to industrial predominance.[33] This change in the economy, accompanied by fluctuations in the labor market, made the country more vulnerable to economic depressions. As a result, when jobs were scarce, "old" Americans resented having to compete with new immigrants for employment.[34]

These factors engendered fear and hostility among established Americans toward the immigrants. The newcomers were viewed as "unlettered and easily corrupted."[35] Many Americans believed that the immigrants' "foreignness" made them more susceptible to ideas and values contrary to those embraced by established Americans. It was feared that any continuing cultural and linguistic ties to Old World countries would create a chasm between the immigrants and established Americans. As a result, a crusade began to make the immigrants "more American."[36]

This Americanization movement, as it came to be known, was quite prevalent during the early part of the twentieth century.[37] It focused in large part on efforts to instruct the new immigrants in the English language.[38] Its proponents "set out to stampede immigrants . . . into adoption of the English language. . . . They used high-pressure, steamroller tactics. They cajoled and they commanded."[39]

Between 1918 and 1920, the Secretary of the Interior organized national conferences which espoused the need for a common language to protect the Nation from foreign influences.[40] The Federal Bureau of Education sponsored a bill which made federal aid available to provide immigrants with English language instruction.[41] Idaho and Utah required non-English speaking people to take Americanization instruction.[42] The early accommodation of multilingualism in the schools[43] gave way to restrictionist sentiments in state legislatures curtailing the use of foreign languages in education. Fifteen states passed laws making English the

31. Marshall, *supra* note 13, at 12.

32. In the late 1890's, immigrants accounted for over 50% of the population of the country's largest cities. *See* Leibowitz, *supra* note 20, at 31.

33. Marshall, *supra* note 13, at 13.

34. *Id.*

35. Leibowitz, *supra* note 20, at 31.

36. Note, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 533 (1985).

37. *See generally* J. HIGHAM, STRANGERS IN THE LAND 234-63 (1955).

38. *See* Note, *supra* note 36, at 534.

39. J. HIGHAM, *supra* note 37, at 247.

40. *Id.* at 259.

41. *Id.*

42. *Id.* at 260.

43. *See supra* text accompanying notes 21-24.

only language of instruction in the classroom.[44]

As Congress restricted the flow of immigration in the early 1920's, the fear that had characterized the Americanization crusade abated, and the movement lost steam.[45] However, in spite of the feverish intensity of the Americanization period, the majority of immigrants, due to social and economic pressures, were driven to learn English as a result of their own motivation.[46]

C. The Current English-Only Movement

In recent years the United States has seen another surge in the number of immigrants flowing over its borders.[47] This latest wave of immigrants is overwhelmingly comprised of people from Spanish speaking countries.[48]

These immigrants generally hail from countries which are geographically close to the United States.[49] This fact, coupled with modern transportation and communication technology, provides them with a greater opportunity to retain cultural and linguistic ties to their country of origin than most other immigrant groups. Some Americans perceive this as a unique threat to American unity,[50] and a new movement has arisen to nullify it. This movement has focused primarily on efforts to declare English the official language.

II. The English Language Amendment

In 1981, 1983, and 1985, legislation for an English Language Amendment (ELA) was introduced in both houses of Congress to combat what some Americans perceive as the pervasiveness of foreign languages in our society.[51]

Former California Senator S.I. Hayakawa, who introduced the first ELA in the Senate,[52] has said:

> During the six years that I served as a United States Senator, I realized that our country was headed toward a crisis that no one

44. *See* J. HIGHAM, *supra* note 37, at 260.

45. *See* NOTE, *supra* note 36, at 538.

46. *Id.*

47. From 1970 to 1980, over six million people immigrated to the United States (this figure includes the estimated number of illegal aliens). NEWSWEEK, June 25, 1984, at 22.

48. *Id.*

49. Marshall, *supra* note 13, at 66. *See also* Note, *supra* note 36, at 522.

50. *See infra* notes 53-60 and accompanying text.

51. H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (1985); S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (1985); H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. E757-58 (daily ed. March 2, 1983); S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,643 (daily ed. Sept. 21, 1983); S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. S3998-99 (1981).

52. S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. S3998-99 (1981).

> seemed willing to address. We have unwisely embarked upon a policy of so-called "bilingualism," putting foreign languages in competition with our own. English has long been the main unifying force of the American people. But now prolonged bilingual education in public schools amid multilingual ballots threaten to divide us along language lines.[53]

Former Senator Hayakawa is also Honorary Chairman of "U.S. English," an organization formed for the purpose of making English the official language of the United States.[54]

Former Senator Hayakawa's views were echoed by Congressman Shumway[55] and Senators Huddleston[56] and Symms[57] in debates over subsequent ELA legislation introduced in both houses of Congress in 1983 and 1985.[58] The ELA's proponents view the abolition of government support for bilingual programs as the remedy for what they believe is a growing cultural separatism between English and foreign language speaking Americans.[59] They have specifically targeted bilingual education programs and bilingual election materials.[60]

There were two versions of the ELA introduced in 1985. The Senate version provided: "Section 1. The English Language shall be the official language of the United States. Section 2. The Congress shall have the power to enforce this article by appropriate legislation."[61]

The House version provided:

> Section 1. The English language shall be the official language of the United States.
>
> Section 2. Neither the United States nor any State shall require by law, ordinance, regulation, order, decree, program, or policy, the use in the United States of any language other than English.
>
> Section 3. This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy requiring educational instruction in a language other than English for the purpose of

53. *ELA Hearings*, *supra* note 7, at 63 (undated letter from former Senator S.I. Hayakawa to potential "U.S. English" supporters).

54. U.S. English boasts a membership of over 100,000. *See* Bikales, *Comment: The Other Side*, 60 INT'L J. SOC. LANG. 77, 82 (1986). The organization also has a number of well known personages on its board: Walter Annenburg, Saul Bellow, and Norman Cousins, among others. *See* Marshall, *supra* note 13, at 25.

55. N. Shumway (R-Cal.).

56. W. Huddleston (D-Ky.).

57. S. Symms (R-Idaho).

58. 131 CONG. REC. H167 (daily ed. Jan. 24, 1985); 131 CONG. REC. S468 (daily ed. Jan. 22, 1985); 129 CONG. REC. S12,635, 12,640-44 (daily ed. Sept. 21, 1983); 129 CONG. REC. E797 (daily ed. March 2, 1983).

59. *See supra* note 53 and accompanying text (statement of former Senator Hayakawa).

60. *Id. See also ELA Hearings*, *supra* note 7, at 11 (statement of Senator Denton); *id.* at 24 (statement of Senator Huddleston).

61. S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985).

making students who use a language other than English proficient in English.

Section 4. The Congress and the States may enforce this article by appropriate legislation.[62]

Article V of the Constitution sets out the procedure for amending that document. Under this article, two-thirds of both Houses must first approve the ELA. The Amendment would then be presented to the states for ratification. If three-fourths of the legislatures of the several states voted to adopt the ELA, it would become an Amendment to the Constitution.[63]

III. Supreme Court Interpretations of Language Rights

In the few Supreme Court cases concerning language rights, the Court has struck down laws that would abridge the rights of language minorities.[64] In *Katzenbach v. Morgan*,[65] a group of New York registered voters challenged the constitutionality of section 4(e) of the Voting Rights Act of 1965.[66] That statute provides that no person shall be denied the right to vote, regardless of his or her inability to read or write English, if he or she has completed the sixth grade in an accredited Puerto Rican school in which the language of instruction is not English. The statute rendered invalid New York State English literacy requirements then in effect.[67]

In *Morgan*, the Court upheld section 4(e) of the Voting Rights Act and determined that it was not necessary to consider the question of the constitutionality of the New York statutes.[68] The Court stated that section 5 of the Fourteenth Amendment[69] gives Congress the power to enact laws to enforce the provisions of the Equal Protection Clause,[70] and section 4(e) was appropriate to secure that end. Hence, the Court held section 4(e) to be constitutional, and the English literacy statutes could not

62. H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985).

63. U.S. CONST. art. V.

64. The first Supreme Court case that touched on language rights was Perovich v. United States, 205 U.S. 86 (1907). In *Perovich*, the principal issue was whether an Alaska district court had erred in convicting the appellant because the *corpus delecti* had not been proved. However, the appellant also charged that the trial court's failure to provide him with an interpreter was in error (neither the facts nor the Court's opinion reveal what language Mr. Perovich spoke or his country of origin). Without elaboration, the Court held that whether an interpreter should be provided is a matter within the discretion of the trial court. *Id.* at 91.

65. 384 U.S. 641 (1966).

66. 42 U.S.C. § 1973b(e) (1972 & Supp. 1986).

67. *Morgan*, 384 U.S. at 643-45.

68. *Id.* at 649.

69. "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

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

be enforced.[71]

However, although the Court remained silent as to the constitutionality of the New York English literacy requirement, the fact that section 4(e) was valid under section 5 of the Fourteenth Amendment indicates that the Equal Protection Clause was at least implicated in New York's use of an English literacy test. Indeed, the Court stated that it perceived a basis upon which Congress might make a determination that the New York English literacy requirement denied the right to vote to Spanish speaking persons encompassed by section 4(e), in violation of the Equal Protection Clause.[72]

In *Lau v. Nichols*,[73] a group of non-English speaking Chinese students charged that the San Francisco school system's failure to provide supplemental English instruction violated the Equal Protection Clause.[74] The Court determined that placing the children in English-only classrooms was a violation of Title VI of the Civil Rights Act of 1964[75] and hence, it was not necessary to consider the equal protection claim.[76]

In *Morgan* and *Lau*, the Supreme Court defended language rights, but extended statutory rather than constitutional protections to language minorities. Two other Supreme Court cases, however, have held that governmental restrictions on language use are constitutionally impermissible.

In *Yu Cong Eng v. Trinidad*,[77] the petitioner sought a writ of prohibition against the enforcement of a Philippine statute[78] which proscribed the keeping of account books in any language other than English, Spanish, or a local Philippine dialect. The petitioner was a Chinese immigrant, literate only in Chinese, who had been arrested for keeping his account books in that language. The Supreme Court found that the statute effectively prevented the petitioner and those similarly situated from conducting business. The Court held that the statute denied Chinese speaking persons the equal protection of the laws and due process under the Fourteenth Amendment.[79]

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71. *Morgan*, 384 U.S. at 652.

72. *Id.* at 656.

73. 414 U.S. 563 (1974).

74. *Id.* at 562.

75. 42 U.S.C. § 2000d (1982) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

76. *Lau*, 414 U.S. at 566.

77. 271 U.S. 500 (1926).

78. American constitutional limitations were applicable to the Philippines because the islands were an American territory at the time this case was heard. In addition, Congress had enacted a bill of rights for the Philippines with guarantees equivalent to the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 523-24.

79. *Id.* at 524-25.

Meyer v. Nebraska[80] was the first case heard by the Court which fully addressed the use of foreign languages in education. In that case, a Nebraska statute prohibited the teaching of any subject in any language other than English before the student had completed the eighth grade.[81] The statute was challenged by a teacher who had been convicted of instructing a student in German. The teacher charged that the statute denied him due process under the Fourteenth Amendment.[82]

The Nebraska Supreme Court upheld the conviction, finding that the purpose of the statute was a worthy one: it prevented foreigners from passing their native language on to their children to prevent it from becoming the primary language of the next generation.[83] The court maintained that a child's adoption of his or her parents' native tongue would threaten the safety of the Nation because such children would always think in their native language. This would "inculcate in them the ideas and sentiments foreign to the best interests of this country."[84]

The Nebraska court's views echo the sentiments held by the Americanizers at the turn of the century,[85] and by the present day ELA proponents.[86] The Supreme Court rejected the state court's view and held the statute to be an impermissible violation of the Due Process Clause of the Fourteenth Amendment.[87] The Court found that the statute restricted the liberty of persons to pursue a lawful occupation.[88]

These cases indicate that the Fourteenth Amendment limits legislative action proscribing the use of foreign languages. Moreover, the *Meyer* Court indicates that the use of a particular language should not be unlawfully forced. The Court stated:

> [T]he individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had a 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.[89]

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80. 262 U.S. 390 (1923).

81. *Id.* at 397.

82. *Id.* at 399.

83. *Id.* at 398.

84. *Id.*

85. *See supra* notes 36-39 and accompanying text.

86. *See supra* notes 47-50 and accompanying text.

87. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. *See Meyer*, 262 U.S. at 400.

88. 262 U.S. at 401.

89. *Id.*

IV. The English Language Amendment, Voting Rights, and Equal Protection

A. English Literacy and Citizenship Requirements

Certain constitutional rights, such as the right to vote, do not extend to all immigrants, but only to those who are citizens of the United States.[90] Thus, immigrants must satisfy all naturalization requirements before they may vote.[91] Accordingly, it is necessary to examine the relationship between English literacy and citizenship requirements.

The Constitution grants Congress power over immigration and naturalization.[92] Throughout American history naturalization requirements have fluctuated with changing attitudes toward immigrants. During this country's infancy, when the government's interest in attracting immigrants was at its peak,[93] the criteria for naturalization were simple. The Naturalization Act of 1790[94] carried only a two year residency requirement for citizenship. Over the years, the requirements were stiffened or relaxed when politically expedient.[95]

In 1906, during the country's peak immigration period,[96] Congress began adding literacy requirements to the naturalization process. The Naturalization Act of 1906[97] was enacted following the recommendations of a special commission, formed at the behest of President Theodore Roosevelt, to review naturalization.[98] The Act contained a vague provision requiring the applicant for citizenship to be able to speak the English language. This requirement remained in effect until it was modified in 1952.[99]

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90. *Cf.* Kramer v. Union Free School Dist., 395 U.S. 621, 625 (1969) (states may impose reasonable citizenship requirements upon the availability of the ballot); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 737 (1978) (citizens have the right to vote).

91. If citizenship is a prerequisite to voting and the naturalization process is the means by which an immigrant becomes a citizen, then it necessarily follows that naturalization requirements must be satisfied before an immigrant may vote.

92. "Congress shall have the power . . . [t]o establish an Uniform Rule of Naturalization." U.S. CONST. art. I, § 8. This provision also implicitly grants Congress power over immigration. L. TRIBE, *supra* note 90, at 1054 n.16.

93. Leibowitz, *supra* note 20, at 27.

94. Act of March 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of January 29, 1795, ch. 20, 1 Stat. 414.

95. In 1798, the Federalist Congress raised the residency requirement to 14 years. This was an attempt to disenfranchise the immigrant population because they were overwhelmingly Republican partisans. In 1802, when the Republicans were again in power, the residency requirement was reduced to five years. *See* Leibowitz, *supra* note 20, at 27-33.

96. *See supra* notes 96-99 and accompanying text.

97. Act of June 29, 1906, ch. 3592, 34 Stat. 596, *repealed by* Act of October 14, 1940, ch. 876, § 504, 54 Stat. 1137.

98. Leibowitz, *supra* note 20, at 33.

99. 8 U.S.C. § 1423 (1982).

The modified naturalization statute imposes a limited English literacy requirement for naturalization. The statute provides that a candidate for United States citizenship must be able to read, write, and speak "simple [English] words and phrases" in "ordinary usage."[100] The language requirement is implemented in a verbal exchange in English between the Immigration and Naturalization Service and the immigrant.[101] The statute does not define the term "simple [English] words and phrases,"[102] nor have the courts fully addressed the level of English proficiency necessary to comply with the statute.[103] The determination of whether an immigrant satisfies the requirement is solely within the discretion of the INS officer conducting the proceeding.[104] However, out of some 200,000 petitions for citizenship, the INS rejects fewer than 100 applicants per year on the ground that they lack the requisite facility in English.[105] This suggests that the level of English proficiency necessary for citizenship is not very high.[106] A command of "simple" English words and phrases is a level of proficiency insufficient to allow the new citizen to comprehend a variety of complicated documents such as election materials written in English.[107]

Not all non-English speaking persons become citizens by way of the naturalization process. For example, Puerto Ricans are citizens of the

100. *Id.*

101. Leibowitz, *supra* note 20, at 57.

102. *See* 8 U.S.C. § 1423 (1982).

103. In a case heard before the 1952 modification of the Act, a federal district court determined that the ability of an applicant to mumble a few banal expressions did not demonstrate an ability to speak English. The court, however, did not identify an English proficiency standard for naturalization. *In re* Swenson, 61 F. Supp. 376 (D. Or. 1945).

104. 8 U.S.C. § 1446(b) (1982). *See also* Leibowitz, *supra* note 20, at 57.

105. 1982 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 162.

106. Leibowitz, *supra* note 20, at 57.

107. For example, in the 1986 November elections the following measures appeared on the California ballot:

Proposition 53:

> GREENE-HUGHES SCHOOL BUILDING LEASE-PURCHASE BOND LAW OF 1986. This act provides for a bond issue of eight hundred million dollars ($800,000,000) to provide capital outlay for construction or improvement of public schools to be sold at a rate not to exceed four hundred million dollars ($400,000,000) per year.

Proposition 57:

> RETIREMENT BENEFITS FOR CONSTITUTIONAL OFFICERS. Precludes basing retirement benefits of certain state constitutional officers on compensation payable to their successors. Fiscal impact: Would result in an annual state saving of about $400,000 by preventing the automatic increase of future retirement benefits of fewer than 20 people when salaries of statewide elected officers increase in the future.

It can hardly be said that a command of "simple [English] words and phrases" would be a level of English proficiency sufficient for a foreign language speaking citizen to understand such complicated language.

United States by statute.[108] Puerto Ricans are not required to satisfy any English literacy requirements before attaining citizenship status.[109] Since the dominant language in Puerto Rico is Spanish, it is obvious that many of these citizens may not understand a ballot written only in Enlgish.

B. Voting Rights

The Constitution grants the right to vote to the people of the United States.[110] Voting is the primary means by which Americans protect a host of interests germane to the quality of their lives. It is the means by which they elect those who will best represent their interests in government.[111] The voting franchise also preserves other civil and political rights. It preserves the procedural due process[112] right of persons to participate in the application and creation of laws that are relevant to their individual situations.[113] Voting also preserves the first amendment right to freedom of political expression.[114]

At present, a federal statute provides for bilingual election materials.[115] That statute provides that if more than five percent of any state or political subdivision's citizens of voting age belong to a single language

108. 8 U.S.C. § 1402 (1982) provides:

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

109. *Id.* *See also* Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575, 578 (7th Cir. 1973).

110. U.S. CONST. art. I, § 2. *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

Several constitutional amendments also govern the right to vote. The Fifteenth Amendment prohibits states from abridging or denying the right to vote on the basis of "race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1. The Nineteenth Amendment prohibits states from abridging or denying the right to vote on account of sex. U.S. CONST. amend. XIX, § 1. The Twenty-fourth Amendment prohibits states from abridging or denying the right to vote by reason of the failure to pay any poll tax or other tax. U.S. CONST. amend. XXIV, § 1. The Twenty-sixth Amendment prohibits states from abridging or denying the right to vote on account of age to citizens who are 18 years of age or older. U.S. CONST. amend. XXVI, § 1.

111. *See infra* note 141 and accompanying text.

112. Procedural due process requires that the government act with procedural correctness. The government must use procedural safeguards designed to give the individual notice and an opportunity to be heard before he or she is deprived of life, liberty, or property. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

113. L. TRIBE, *supra* note 90, at 777-84.

114. *Id.* *See also* Buckley v. Valeo, 424 U.S. 1 (1976) (discussing the right of political expression).

115. 42 U.S.C. § 1973aa-1a(b) (1982 & Supp. 1986).

minority, and the illiteracy rate of this group is higher than the national average, the government *must* provide voting materials in the language of that group.[116] The text of the House version of the ELA specifically prohibits federal and state governments from requiring the use of any language other than English in any "ordinance, regulation, order, decree, program or policy."[117] Thus, since the bilingual ballot statute requires that federal and state governments provide ballots in languages other than English, the passage of the ELA would curtail bilingual election materials currently mandated by the government.

The Congressional Research Service conducted a study of the House version of the ELA[118] to determine the impact of the Amendment on present law and policy.[119] The study found that the proposed Amendment "would appear to erect a legal barrier to state or federal action of any kind—executive, legislative, or judicial that would 'require' or otherwise compel the use of any language other than English for any purpose not comprehended by the section 3 exception."[120] Thus, because bilingual ballots could no longer be mandated by the government, the Amendment introduced in the House would destroy the statutory protection afforded the voting rights of language minorities.[121] The Senate version would have the same effect.[122]

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116. *Id.*

117. H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (1985).

118. Dale, Legal Analysis of H.R.J. Res. 169 Proposing to Amend the United States Constitution to Make English the Official Language of the United States (Congressional Research Service, Library of Congress 1983) (copy of the report on file at *Hastings Constitutional Law Quarterly* offices).

119. Although the Congressional Research Service's analysis concerns the 1983 proposed Amendment, it applies equally to the Amendment proposed in 1985, since the language of the latter amendment is virtually identical to that of the former. *Compare* H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. E757-58 (daily ed. March 3, 1983) *with* H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (1985).

120. Dale, *supra* note 118, at 2.

121. Several other federal statutes providing for multilingual services would also be invalidated: bilingual education statutes, 20 U.S.C. § 1703(f) (1982); the Court Interpreters Act, 28 U.S.C. § 1827 (1982 & Supp. 1986); and health related services, 42 U.S.C. §§ 254b(f)(3)(J) & 254c (1982 & Supp. 1986) (migrant health centers will provide bilingual services where necessary), *id.* § 4577(b) (government drug and alcohol abuse treatment programs shall provide bilingual services where a substantial portion of the community served is of limited English speaking ability).

122. The Congressional Research Service analysis gives some indication of what effect the Senate version of the ELA would have. Sections one and two of the Senate version correspond exactly to sections one and four of the House version. *See supra* notes 61-62 and accompanying text. In interpreting sections one and four of the House version, the study found that:

> The wording of the first section would not *per se* seem to mandate or prohibit anything, at least in the absence of legislative history that might elucidate its intended meaning. Of course, Congress and the states are also empowered to give legislative definition to the essentially hortatory language of section 1 by the concurrent enforcement authority granted in section 4 of the proposed amendment.

The ELA would thus have a profound effect on the voting rights of language minorities. A study undertaken by the Mexican American Legal Defense and Educational Fund found that twenty-four percent of Hispanic voters used bilingual ballots in the 1980 elections.[123] Under the bilingual election materials statute,[124] 310 jurisdictions are required to provide bilingual election materials.[125] These statistics show that bilingual election materials are needed by a significant portion of the population.

If the government ceases to provide these voting materials, a substantial number of United States citizens would be disenfranchised because they could not understand a ballot written only in English. The ELA would not prevent federal, state, or local governments from providing bilingual election materials if they so chose, but it would prevent them from making the provision of those materials mandatory.[126] Although the ELA is permissive in nature, the right to vote is too important a right to be left to the discretion of local governments.[127] The prejudice against foreign language speakers may be higher in those jurisdictions with high foreign language speaking populations, the same jurisdictions which now must provide bilingual election materials. If the availability of bilingual election materials were made permissive rather than mandatory, language minorities would be in a "Catch-22" situation.[128] To get state and local governments to provide bilingual election materials, language minorities would need to elect representatives who would support legislation to provide these materials. However, they could be foreclosed from electing such representatives if they did not understand a ballot written only in English.

Congress has documented that language minorities suffered a history of discrimination prior to the implementation of bilingual election materials.[129] Accordingly, it is quite possible that if language minorities are prevented from intelligently exercising the franchise, legislators would ignore issues that are unique to the language minority community, because legislators are responsive primarily to voters. The elimination of bilingual ballots would also open a window of opportunity for political corruption. If bilingual ballots were not provided, language minorities

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Dale, *supra* note 118, at 2. Hence, in light of the statements made by the ELA's proponents in Congress, the effect of the Senate version would be the same as that of the House version.

123. S. REP. NO. 417, 97th Cong., 2d Sess., 66 n.219, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 245 n.219.

124. 42 U.S.C. § 1973aa-1a (1982 & Supp. 1986).

125. Note, *supra* note 36, at 524.

126. *See supra* notes 119-122 and accompanying text.

127. *See supra* notes 110-114 and accompanying text.

128. A "Catch-22" is "a difficult situation or problem whose seemingly alternative solutions are logically invalid." AMERICAN HERITAGE DICTIONARY, 247 (2d College ed. 1982). *See* J. HELLER, CATCH-22 (1967).

129. *See infra* notes 167-173 and accompanying text.

would be forced to rely on other sources for information about what appears on the ballot. This would leave them vulnerable to false or misleading information. Thus, the permissive nature of the ELA offers no protection against the effective disenfranchisement of language minorities.

The Supreme Court has not held that governments are constitutionally required to provide bilingual election materials. However, it is contrary to current laws and the Constitution to grant citizenship to immigrants in spite of their limited English ability and then deny them the opportunity to *effectively* exercise the voting franchise in a manner consistant with their status as American citizens.[130] The government would deny them the opportunity to effectively exercise their franchise if it did not provide non-English proficient voters with a ballot they can understand. If the government has certified that an individual has met the criteria for citizenship set forth by Congress, and if the satisfaction of those criteria does not equip the new citizen with the tools necessary to exercise his or her voting rights, then an affirmative duty should be placed upon the government to provide the means necessary for the effective exercise of the voting franchise.

C. Equal Protection

The ELA has equal protection ramifications. Since subsequent amendments to the Constitution supersede prior amendments,[131] the ELA would invalidate any other constitutional amendment with which it conflicts. Thus, if the ELA conflicts with any part of the Fifth or Fourteenth Amendments, that part of the prior Amendment would not apply to any subject preempted by the ELA. Because of the important role played by the Equal Protection Clause in the realm of individual freedom from government supported discrimination,[132] the ELA's impact on current constitutional protections should be closely examined and questioned.

The Equal Protection Clause of the Fourteenth Amendment guarantees that people will be treated equally under the law: it provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[133] Equal protection applies with similar force to federal legislation.[134] The Equal Protection Clause prohibits the govern-

130. Currently the federal statute providing for bilingual election materials and the Equal Protection Clause protect the language minority's ability to vote effectively. *See infra* notes 131-197 and accompanying text.

131. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

132. *See* Yick Wo v. Hopkins, 118 U.S. 356, 367-68 (1886); Slaughter House Cases, 83 U.S. (16 Wall.) 36, 130 (1873).

133. U.S. CONST. amend. XIV, § 1.

134. Although the Equal Protection Clause applies only to the states, the Court has held that when the federal government passes legislation which, if it were state action, would violate

ment from treating differently classes of persons who are similarly situated.

To analyze an equal protection issue, the courts utilize three standards of review. The "rational basis" test provides the lowest level of review. Under this standard, the statute sought to be enforced must be rationally related to a legitimate state objective.[135] Under this standard, the statute is presumed to be constitutional and is almost always upheld.[136] A somewhat more rigid review is required when "intermediate-level" scrutiny is employed. Under this standard of review, the statute must be necessary for the achievement of an *important* state interest or it will be struck down.[137]

The highest level of review, "strict scrutiny," is employed when the statutory classification involves a "suspect class"[138] or a "fundamental right."[139] When strict scrutiny is applied, the statute is not presumed to be constitutional and the government has a heavy burden to justify the statutory classification by showing that a compelling governmental interest permitted the classification. The government must use the least dras-

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the Equal Protection Clause, the federal legislation violates the equal protection component of the Due Process Clause of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

135. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Yick Wo v. Hopkins, 118 U.S. 356 (1886); *see also* L. TRIBE, *supra* note 90, at 994.

136. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910).

137. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Trimble v. Reed, 430 U.S. 762 (1977) (classification based on illegitimacy); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971) (classifications based on gender).

138. The Supreme Court has enumerated five criteria which identify a suspect class: (1) the class has a history of purposeful discrimination; (2) members of the class possess a readily identifiable trait that distinguishes them from others; (3) the identifiable trait is immutable; (4) the trait bears no relation to the class' ability to contribute to society; and (5) the class has little or no political power. Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973).

The Supreme Court has identified three classes as suspect for equal protection purposes: race (Korematsu v. United States, 323 U.S. 214 (1944)); national origin (Hernandez v. Texas, 347 U.S. 475 (1954)); and alienage (Graham v. Richardson, 403 U.S. 365 (1971)).

Several federal courts have determined that language minorities are not a suspect class. In Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983), a Spanish-speaking citizen claimed that the Secretary of Health and Human Services' failure to provide forms and services in Spanish denied him equal protection. The court declined to apply the "strict scrutiny" test because although "[a] classification is implicitly made . . . it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class." *Id.* at 41. *See also* Frontera v. Sindell, 522 F.2d 1215, 1219-20 (6th Cir. 1975); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973).

139. A fundamental right is a right which is implicitly or explicitly guaranteed by the Constitution. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). The Supreme Court has identified three rights as fundamental: procreation (Skinner v. Oklahoma, 316 U.S. 535 (1942)); freedom to travel (Shapiro v. Thompson, 394 U.S. 618 (1969)); and the right to vote (Dunn v. Blumstein, 405 U.S. 330 (1972)).

tic means possible to further its interest.[140]

The right to vote is a fundamental right. According to the Supreme Court:

> [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[141]

Hence, any inequality of opportunity to exercise the right to vote will be struck down unless it serves a compelling state interest.

The Supreme Court has held several types of legislative action to be an impermissible restraint on the right of citizens to participate in the electoral process, in violation of the Equal Protection Clause. In *Carrington v. Rash*,[142] the Court held unconstitutional a Texas law which barred members of the armed services from voting in that state.[143] The legislature made a sweeping determination that such persons were not residents of the state even though some individual servicemen met the state's residency requirements.[144] The Court determined that the denial of the right to vote based on one's occupation was discriminatory and violated the Equal Protection Clause.[145]

In *Reynolds v. Sims*,[146] the Court determined that the Alabama Legislature was so malapportioned that a substantial portion of the population was denied representation in the legislature in violation of the Equal Protection Clause.[147] The Court held that the Equal Protection Clause guarantees equal legislative representation for all citizens no matter where they live.[148] In so holding, the Court stated that "[a] citizen, a qualified voter, is no more nor less so because he lives in the city or on the farm."[149]

In *Harper v. Virginia Board of Elections*,[150] the Court held that the imposition of a poll tax was a violation of the Equal Protection Clause because it conditioned the right to vote on the financial status of Virginia citizens. The Court stated that "[t]he Equal Protection Clause of the Fourteenth Amendment restrains the states from fixing voter qualifica-

140. *Rodriguez*, 411 U.S. at 16-17.
141. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).
142. 380 U.S. 89 (1965).
143. *Id.* at 96.
144. *Id.* at 89.
145. *Id.* at 96.
146. 377 U.S. 533 (1964). *See also supra* text accompanying note 141.
147. 377 U.S. at 568-69.
148. *Id.* at 568.
149. *Id.*
150. 383 U.S. 663 (1966).

tions which invidiously discriminate."[151] The Court further stated that "[w]ealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process."[152]

In *Kramer v. Union Free School District,*[153] the Court held that barring unmarried persons from voting in school board elections was prohibited under the Equal Protection Clause. The Court determined that the voting rights of unmarried persons had been abridged and that there was no compelling state interest to justify that abridgment.[154]

A major theme running through these cases is that, while the need to ensure an intelligent exercise of the ballot is a compelling state interest, any restraint on the right to vote that is not necessary to achieve that end is an impermissible basis on which to deny a citizen his or her right to vote. This theme reflects the Court's interest in preserving an intelligent, and popular, exercise of the franchise.

The availability of bilingual ballots is in keeping with this constitutional concern. English proficiency does not reflect upon the intelligence of the individual voter. Speaking a foreign language has nothing to do with an intelligent use of the ballot, but the inability to understand the ballot does. If a voter cannot read the ballot she will not know for whom or for what she is voting. It does not seem that the Court would sanction such an ignorant use of the franchise. Yet, an ignorant use of the franchise would be possible if the ELA were passed, since non-English proficient speakers will not be prevented from entering the voting booth and casting a vote. On the contrary, such voters will only be impeded from knowing for what or for whom they are voting because they could not read and understand a ballot written only in English.

In *Davis v. Schnell*[155] and *Louisiana v. United States,*[156] Alabama and Louisiana, respectively, required that prospective voters pass a literacy test as a prerequisite to voting.[157] The states' statutory schemes required that a prospective voter demonstrate that he or she could understand and give a reasonable interpretation of any section of the state or Federal Constitution.[158] The Supreme Court found that although the statutes were facially neutral, they had been applied so as to deny to blacks their voting rights.[159] The Court held that the literacy

151. *Id.* at 666. The Court did not apply the Twenty-fourth Amendment's prohibition against poll taxes to the determination of the issue before it.

152. *Id.* at 668.

153. 395 U.S. 621 (1969).

154. *Id.* at 634.

155. 81 F. Supp. 872 (S.D. Ala.), *aff'd,* 336 U.S. 933 (1949).

156. 380 U.S. 145 (1965). *See also* Lassiter v. Northampton County Bd., 360 U.S. 45 (1959) (literacy tests are not *per se* unconstitutional, but their application must not discriminate against a particular group).

157. *Davis,* 81 F. Supp. at 874; *Louisiana,* 380 U.S. at 149.

158. *Davis,* 81 F. Supp. at 874; *Louisiana,* 380 U.S. at 149.

159. *Davis,* 81 F. Supp. at 880; *Louisiana,* 380 U.S. at 151.

tests invidiously discriminated against blacks, and because they were not justified by any compelling state interest, the tests violated the Fourteenth Amendment.[160]

The ELA imposes such a literacy requirement on language minorities. While the ELA, by its terms, does not expressly state that language minorities cannot vote, it would certainly have that effect. The Amendment, by prohibiting mandatory bilingual election materials, would create a barrier to voting by non-English proficient language minorities because they do not understand ballots written only in English. Without the availability of bilingual election materials, language minorities are saddled with an English proficiency requirement that must be satisfied before they may effectively exercise their right to vote. The type of literacy test imposed by the ELA is similar in effect to the type invalidated by the Supreme Court in the *Davis* and *Louisiana* cases. While language minorities will not be prevented from entering the voting booth, their casting of a ballot would most certainly be an empty gesture because they would not know for whom or for what they are voting.[161]

Federal courts have held that the right to vote contemplates more than the mere mechanical act of pulling the lever in the voting booth.[162] The exercise of the franchise includes the right to an *effective* vote. A federal district court, in *Garza v. Smith*,[163] held that the right to vote encompasses "the right to be informed as to which mark on the ballot . . . will effectuate the voter's political choice."[164]

Although the implied literacy test that would be imposed by the ELA is facially neutral,[165] as were the tests in *Davis* and *Louisiana*, the ELA targets language minorites just as the tests in *Davis* and *Louisiana* targeted blacks. In those cases the Court found the literacy tests to be impermissibly discriminatory.[166] The literacy test imposed by the ELA would have the same effect, as it would prevent language minorities alone from effectively exercising their right to vote.

Deliberate systems of disenfranchisement employed against black Americans have also been employed against language minorities. In 1975, when Congress was reviewing the effectiveness of the Civil Rights Act of 1965,[167] the Commission on Civil Rights recommended an addi-

160. *Louisiana*, 380 U.S. at 153.

161. *See supra* text accompanying notes 115-117.

162. Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575, 579 (7th Cir. 1973); Garza v. Smith, 320 F. Supp. 131, 136 (W.D. Tex. 1970).

163. 320 F. Supp. 131 (W.D. Tex. 1970).

164. *Id.* at 136.

165. *See supra* notes 61-62 and accompanying text.

166. *See supra* note 159 and accompanying text.

167. 42 U.S.C. §§ 1971-1973ee-4 (1982).

tion to the Act[168] which would protect the voting rights of language minorities.[169] A special congressional subcommittee was formed to study the problem. The subcommittee documented "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English,"[170] and further noted that "[l]anguage minority citizens like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation."[171] After outlining the numerous devices used to disenfranchise Mexican-Americans, the subcommittee found that the use of English-only ballots further excluded language minorities from the electoral process.[172] The subcommittee found that while English-only elections are racially neutral, they have an impermissible discriminatory impact against language minorities.[173]

In complete harmony with the subcommittee's determination that language minorities had been subjected to discrimination in their attempts to exercise the franchise, Congress adopted the subcommittee's suggestion and expanded the meaning of literacy test to include the use of English-only election materials in areas where more than five percent of eligible voters are members of a single language minority.[174] In 1982, Congress reaffirmed its determination that bilingual election materials are necessary and extended this requirement for another ten years.[175]

The foregoing discussion reveals that English-only ballots, by analogy to the devices employed in the South and by congressional appraisal of English-only elections, constitute a type of literacy test which works to discriminate against language minorities and to deprive them of the right to vote effectively. It also suggests that bilingual election materials are constitutionally required, because to omit them would permit an unconstitutional literacy test.

The ELA theoretically could be upheld if treated as a statute subject to equal protection analysis. Although the ELA would impact adversely on a fundamental right, the right to vote, it may still be permissible under the equal protection strict scrutiny standard if there is a compelling governmental interest in such regulation.[176]

168. The Commission's recommendation was adopted and is now codified at 42 U.S.C. § 1973aa-1a (Supp. 1986).

169. 1975 U.S. CODE CONG. & AD. NEWS 774, 790.

170. *Id.*

171. *Id.* at 791.

172. *Id.* at 794.

173. *Id.* at 798, 800.

174. *Id.* at 798.

175. 1982 Voting Rights Act Amendment, 42 U.S.C. § 1973aa-1a (Supp. 1986).

176. *See supra* note 140 and accompanying text.

1. Compelling State Interest

Proponents of the ELA generally advance three reasons for its adoption. First, they claim that English is the common bond of the American people and that bond is being threatened by the encroachment of foreign languages.[177] Second, they urge that all language minorities must learn English if they are to participate fully in American society.[178] Finally, they argue that bilingual services actually discourage language minorities from learning English.[179]

As to the first proposition, it is true that language is *a* common bond of the American people, but it is not the *only* one nor is it the most important. Americans also share common political bonds: the belief in a democratic form of government, freedom, and equality of opportunity. These beliefs are more significant than the language in which they are expressed.

In addition, although the ELA's proponents vociferously declare that our national unity is threatened, they provide no valid evidence of this alleged disunity. If in fact the use of languages other than English is causing difficulties so serious that a constitutional amendment is needed to remedy them, it would seem that some evidence of specific instances in which these problems manifest themselves would be available, especially in light of the government's heavy burden to show that the proposed restraint on the right to vote is necessary for the acheivement of a compelling state interest.

The ELA's proponents seem to base the claim that the primacy of English is in danger, and consequently, that our national unity is threatened, on the simple fact that English is not the primary language of a minority of Americans. Senator Huddleston, the Senate sponsor of the ELA introduced in 1983 and 1985, points out that twenty-two million Americans speak languages other than English *in the home*.[180] However, this statistic lends questionable support to the position of the ELA's proponents, because they have stated that the purpose of the ELA is *not* to regulate the use of English in the home.[181] The fact that twenty-two million Americans speak a language other than English in the home might be significant insofar as it may indicate the pervasiveness of foreign languages in American society; however, even in this context the figure is misleading. It cannot be assumed that people who speak a language other than English at *home* cannot speak English at all, nor can it be

177. H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. E5877-78 (daily ed. Nov. 18, 1983); S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 7444 (1981).

178. *Id.*

179. *Id.*

180. 129 CONG. REC. S12,641 (daily ed. Sept. 21, 1983) (citing the 1980 Census). This figure represents 10.9% of the population.

181. *ELA Hearings, supra* note 7, at 23 (statement of Senator Huddleston).

assumed that they do not use English at other times and in other environments. In fact, the 1980 Census also revealed that of the eleven million Hispanics who reported that they speak Spanish at home, over eight million reported that they also speak English well or very well.[182] Only 2.7 million reported that they speak very little or no English at all.[183] In addition, of those who speak a foreign language other than Spanish in the home, almost nine million reported that they speak English well or very well and only 1.4 million reported that they speak little or no English.[184] Thus, it is clear that the primacy of the English language is not in danger.

The ELA's proponents also frequently point to problems in other multilingual countries, such as Canada and India, as evidence that the United States is in danger of splitting along language lines.[185] However, what they fail to recognize is that the discord in other lands has arisen not as a result of language differences alone, but in part because some governmental entity sought to deny language rights.[186] They also seem to overlook countries like Switzerland where many language groups peacefully coexist. In any event, from the language difference difficulties in other countries, it cannot be assumed that the same difficulties will necessarily befall the United States.

Senator Huddleston stated during debates on the Amendment that "the United States enjoys the blessings of one primary language spoken and understood by most of its citizens."[187] This hardly supports the proposition that the primacy of English is in danger of being usurped by other languages. On the contrary, it accurately states that English is the language spoken by the overwhelming majority of Americans.

The second proposition, that a command of the English language is necessary for full participation in American life, is quite true and the language usage of most immigrants inevitably shifts from non-English monolingualism, to bilingualism, and then eventually to English monolingualism.[188] The perception that large numbers of immigrants are not learning English is faulty, because the process takes time, especially for the older immigrant who seeks to learn a second language late in life.[189] The United States is experiencing a period of rapid immigration,[190] and

182. 1980 CENSUS OF POPULATION AND HOUSING, doc. PHC80-S1-1 at 14.

183. *Id.*

184. *Id.*

185. S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,642 (daily ed. Sept. 21, 1983).

186. Marshall, *supra* note 13, at 32.

187. 129 CONG. REC. S12,640 (daily ed. Sept. 21, 1983).

188. Marshall, *supra* note 13, at 66. *See also* J. FISCHMAN, LANGUAGE POLICY: PAST, PRESENT AND FUTURE IN LANGUAGE IN THE U.S.A. 516, 517 (1977).

189. 1982 U.S. CODE CONG. & AD. NEWS 177, 244-45.

190. Although restrictions on immigration have kept the number of legal immigrants to about 500,000 per year, illegal immigration has significantly increased the number of non-

there is a constant influx of non-English monolingual speakers. Consequently, as "old" immigrants become more proficient in English, "new" immigrants arrive who are at an earlier stage in the language shifting process.[191]

Bilingual election materials allow some language minority citizens to participate in American political life while the language learning process takes place. If the ELA's proponents are really concerned about the non-English proficient citizen's ability to participate in society, it is a curious course of action to deny them the very tools that allow them to participate in the voting process.

The third proposition, that bilingual services retard and discourage the acquisition of English, is untrue. This idea is contradicted in part by the ELA proponents' assertion that English is necessary for full participation in American life, for this in itself is a strong incentive for immigrants to learn English and it is not lessened by the availability of bilingual services.[192] Moreover, studies have shown that today's immigrants are learning English at much the same rate, or faster, than immigrants did a hundred years ago.[193] Bilingual services have had little effect on the immigrants' speed in learning the English language,[194] yet bilingual services allow language minority citizens to participate in society while they work to become proficient in English.

The foregoing discussion indicates that there is no *compelling* governmental interest in passing the ELA. The Amendment would not withstand strict scrutiny and if it were a statute, it would probably be deemed a violation of the Equal Protection Clause because a fundamental right is involved.

2. *Least Drastic Means*

When a fundamental right is involved, the government is required to use the least drastic means to achieve its objective.[195] The objective enumerated by the ELA's proponents is to protect the primacy of the English language by encouraging the use of English, and thereby also preserving American unity. The ELA is not the least drastic means by which this objective may be achieved. There are less extreme *constitutional* remedies for the problems perceived by the ELA's proponents.

Since Congress has power over naturalization,[196] one such remedy

English speaking people flowing over the Nation's borders. Between 1970 and 1980, over six million legal and illegal immigrants arrived in the United States. *Closing the Door?,* NEWSWEEK, June 25, 1984, at 18.

191. *See generally* S. VELTMAN, LANGUAGE SHIFT IN THE UNITED STATES (1983).

192. Veltman, *Comment,* 60 INT'L J. SOC. LANG. 178 (1986).

193. *Id.*

194. *Id.*

195. *Rodriguez,* 411 U.S. at 16-17.

196. *See supra* note 92.

would be to revise naturalization laws to require a clearly defined, higher level of English literacy for naturalization. In addition to ensuring that all citizens would be fluent in English, this remedy would be a constitutional way to eliminate the need for bilingual ballots. If immigrants were required to demonstrate a high degree of English proficiency before they could become citizens, they would possess a facility in English sufficient to allow them to understand a ballot written in English. This remedy is by far less extreme than adopting a constitutional amendment which would invalidate a portion of the Equal Protection Clause as it applies to language minority citizens.

An even less drastic remedy would be for the government to provide additional funding for the establishment of more English language classes. This remedy would preserve the right to vote and speed the language minority's acquisition of English.

Since subsequent amendments to the Constitution supersede prior amendments[197] as they apply to the new amendment's subject matter, the fact that the ELA would violate the Equal Protection Clause would not foreclose its application to bilingual voting materials. Yet it is for precisely this reason that the ELA should be rejected. The Fourteenth Amendment was enacted shortly after the Civil War to preserve important civil rights which had previously been inadequately protected by the government.[198] The ELA should be rejected: it would partially invalidate one of the most important constitutional provisions, which has been in place for over a hundred years, and which provides for the equal treatment of all persons. Language minorities will be denied their right to an effective vote under the ELA.

Conclusion

The Framers of the Constitution did not establish an official language. This was not an oversight, but the result of reasoned language planning. An "Americanization" movement arose in the early twentieth century in response to a fear that language differences between established Americans and immigrants would divide the country. The Americanizers' attempt to coerce immigrants into adopting the English language, however, proved to be unnecessary. The immigrants, given time, eventually learned English as a result of their own motivation, and the division feared by the Americanizers never developed.

The current unease about language differences parallels the fears expressed by turn-of-the-century Americans. These fears have led to a current movement to add an amendment to the Constitution declaring

197. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Court held that the Eleventh Amendment was limited by the subsequent passage of the Fourteenth Amendment with which it partially conflicted. *Id.* at 456.

198. L. TRIBE, *supra* note 90, at 256.

English the country's official language. The ELA does not seek only to state the obvious, that English is the primary language of the United States. It also seeks to eliminate bilingual election materials which allow non-English proficient citizens to exercise effectively their constitutional right to vote.

The courts have condemned the proscription of the use of languages other than English; language rights have traditionally been protected through the enactment of statutes designed to require that the government provide bilingual services, such as bilingual ballots. Non-English proficient citizens need bilingual election materials because their facility in English, although sufficient for the purposes of naturalization requirements, is insufficient to allow them to understand complicated ballots written only in English. Passage of the ELA would prohibit the government from mandating bilingual election materials. Thus, the statute providing for these materials would be unconstitutional.

However, such an interference with the right to vote violates current constitutional law under the Equal Protection Clause because English-only ballots constitute an implied, impermissible literacy test.

The Constitution does not make proficiency in English a prerequisite to the exercise of constitutional rights. It provides for the equal application of the laws to all citizens regardless of their ability to speak English. The ELA should be rejected.

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