

# ARTICLES

## THE SHAME OF SPANISH: CULTURAL BIAS IN ENGLISH FIRST LEGISLATION

WENDY OLSON\*

### INTRODUCTION

*My family eats enchiladas for Christmas dinner. The menu selection has a lot to do with the fact that the enchiladas my grandfather makes taste a heckuva lot better than turkey, ham, stuffing and cranberry sauce—which most of us had too much of at Thanksgiving anyway. But a lot of it has to do with the fact that there's this dissolving Mexican lineage running through my family on my mother's side. Grandpa is an Ortega. Most of us are Olsons and Hendricks. On those late Christmas afternoons, with discarded wrappings heaped into one pile and ribbons in another, ready to make the festive decor of the holiday an all-too-quick-memory, we all reach back to a part of each of us that is not common in Pocatello, Idaho—our Hispanic heritage. We grab the identity, if only for an evening, if only once a year.*

*But food and my grandfather only let me reach so far into the Hispanic part of me. When I hear, *Como se llama?*<sup>1</sup> or *Como esta usted?*<sup>2</sup> I know that once I've answered the first few questions, I will have exhausted my Spanish vocabulary, built up in phrases mimicked from my grandfather's greetings since I was a small child. Through my Spanish language deficiency, I feel that part of my grandfather's heritage is shut off from me. I feel like I'm still looking for that part of me that grew up in migrant worker camps across the Southwest.*

*I don't speak Spanish, but I know that being Hispanic is more than just eating enchiladas with my grandfather on Christmas day.*

---

\* J.D. Stanford, 1990; B.A. Drake University, 1986. The author is currently a law clerk to Chief Judge Barbara J. Rothstein, U.S. District Court, Seattle, Washington. The author would like to thank Professor Blanca Silvestrini for her encouragement and support during the research and writing of this article.

1. What is your name?
2. How are you?

*Because I don't speak Spanish, I feel that there is a part of me missing. My language deficiency is a barrier between me and the past, a past I just can't reach because I can't say it in a way that my grandfather's ancestors would understand.*<sup>3</sup>

In 1986, voters in California, by a margin of more than 3 to 1,<sup>4</sup> approved Proposition 63, which by constitutional amendment made English the state's official language.<sup>5</sup> The provision orders the state legislature to "make no law which diminishes or ignores the role of English," and permits any individual or business to sue to enforce the law.<sup>6</sup> The passage of this provision came at a time of rising Hispanic population<sup>7</sup> and during a heightened battle over bilingual education.<sup>8</sup> And although, at the time, six other states had either statutes or constitutional provisions declaring English the official language,<sup>9</sup> the success of Proposition 63 in California marked the first significant victory for a nationwide, grassroots movement called U.S. English.<sup>10</sup> Since Proposition 63's passage, nine other

3. I know that I could correct this deficiency by learning to speak Spanish. The point of this narrative is to illustrate what the language—learned or not—means to my own sense of identity.

4. Seventy-three percent voted "yes" on Proposition 63, which amended the California constitution to make English the official language of the state, while only twenty-seven percent voted "no." Trombley, *Assemblyman Vows to Carry the Ball for English-Only Action*, L.A. Times, Nov. 6, 1986, at 3, col. 5.

5. CAL CONST. art. III, § 6. Although, on its face, Proposition 63 and other English-Only measures apply to all non-English languages, this article will focus almost exclusively on the measures' effects on Hispanics, primarily because of the social context in which the measures were promulgated. See *infra* note 7 and accompanying text.

6. CAL CONST. art. III, § 6.

7. A September 1988 Census Bureau report showed that the Hispanic population of the United States had increased thirty-four percent since 1980, five times as much as the rest of the U.S. population over the same period. About half of the increase was attributed to immigration. The report showed that California had the highest number of Hispanics—an estimated 6.5 million, or thirty-four percent of the nation's Hispanic population. McLeod, *Sharp Rise in Hispanic Population in U.S.*, San Francisco Chron., Sept. 7, 1988, at 8, col. 1.

8. See, e.g., Chambers, *Education: Ending Bilingual Schooling*, N.Y. Times, Dec. 9, 1986, at C1, col. 5 ("No sooner had the voters here overwhelmingly made English the official language of California than the campaign's sponsors began preparing legislation to put an end to bilingual education in the state. The legislation is part of what will be a major political battle over the survival of bilingual education in California.").

9. The six states with English as the official language provisions enacted before 1986 are: Illinois, by statute in 1969, ILL. REV. STAT. ch. 1, para. 3008 (1987); Indiana, by statute in 1984, IND. CODE § 1-20-10-1 (1987); Kentucky, by statute in 1984, KY. REV. STAT. ANN., § 2.013 (Baldwin 1986); Nebraska, by constitutional amendment in 1923, NEB. CONST. art. 1, § 27; Tennessee, by statute in 1984, TENN. CODE ANN. § 4-1-404 (1987); and Virginia, by statute in 1981, VA. CODE ANN. § 3.1-264 (1987). *States Consider Bills, Referenda on English Only*, English Plus Information Clearinghouse Newsletter, March/April 1988, at 5. Of these six states, Illinois has the highest percentage of Hispanic residents—four percent of the state's population. McLeod, *supra* note 7.

10. U.S. English was founded in 1983 by, among others, former California senator S.I. Hayakawa, who during his last term introduced legislation to make English the official language of the United States. The group describes itself as "a national, non-profit, non-partisan membership organization to defend the public interest in the grow-

states have enacted English-Only<sup>11</sup> provisions,<sup>12</sup> including three in November of 1988—Arizona, Colorado and Florida<sup>13</sup>—with Hispanic populations that together account for nearly sixteen percent of the country's Hispanic population.<sup>14</sup>

Considerable controversy marked both the campaign for Proposition 63 and its effects. Opponents charged racism.<sup>15</sup> Proponents contend that bilingualism creates cultural division and slows immigrants' assimilation.<sup>16</sup> Because the provision allows both the state

ing debate on bilingualism and biculturalism . . . [and] to secure legal protection for English as the official language of the United States."

11. The terms English-Only and English as the official language will be used interchangeably throughout this article. Both terms designate a movement, in some cases embodied in legislation or constitutional amendments, aimed at the surface on limiting in some way public use of non-English languages. For a discussion of the implications of this aim, see *infra* notes 56-104 and accompanying text.

12. The nine states are: Arkansas, by statute in 1987, ARK. STAT. ANN. § 1-4-117 (1987); Georgia, 1986 GA. LAWS 70; Mississippi, by statute in 1987; North Carolina, by statute in 1987, N.C. GEN. STAT. § 145-12 (1987); North Dakota, by statute in 1987, N.D. DENT. CODE § 54-02-13; South Carolina, by statute in 1987; Arizona, by constitutional amendment in 1988, ARIZ. CONST. art. 28; Colorado, by constitutional amendment in 1988; and Florida, by constitutional amendment in 1988. *States Consider Bills, Referenda on English Only*, *supra* note 9, at 5, 7. In addition, 19 other states in 1988 introduced bills that would make English the state's official language, and in 1989, the Alabama legislature passed a proposed amendment to its state constitution that would make English the state's official language. The measure was scheduled to be included on the ballot for the general election in June 1990. WESTLAW, Billcase (1990). In a 1978 constitutional amendment, Hawaii made English and Native Hawaiian coequal official languages. HAW. CONST. art. 15, § 4. The 1974 Louisiana constitution upholds rights to preserve and promote minority languages and cultures. LA. CONST., art. 12, § 4. New Mexico's 1912 constitution authorized training of Spanish-speaking teachers and required all official documents to be published in both English and Spanish for 20 years. *States Consider Bills, Referenda on English Only*, *supra* note 9, at 5, 7. In 1989, the Oregon state senate passed a resolution stating that "the use of diverse languages in business, government and private affairs, and the presence of diverse cultures is welcomed, encouraged and protected in Oregon." 1989 Ore SJR 16 (65th Sess.). The resolution stated that the senate refused to endorse English as the state's official language. *Id.*

13. Ingwerson, *English-only Laws: How Broad?*, The Christian Science Monitor, Nov. 29, 1988, at 3, col. 1.

14. McLeod, *supra* note 7. In this paper, I have used the term Hispanic to refer to all people with ancestry in Spanish-speaking nations and the term is meant to be used interchangeably with the term Latino. The term Latino is used expressly only when it is the term used by a source and I was unable to determine whether the source used Latino interchangeably with Hispanic.

15. See, e.g., Reyes, *Bilingual Group Told English-Only Crusade Undermines Freedoms*, L.A. Times, Jan. 29, 1987, at B12, col. 1 ("English-only programs . . . stigmatize and demean children when they do not find their language and culture reflected and respected in public schools"); del Olmo, *Se Habla Ingles: Prop. 63 A Cruel Joke, Could Cost us Dearly*, L.A. Times, Aug. 28, 1986, at B5, col. 1 ("Many Latino and Asian-American activists are criticizing [Proposition 63] as mean-spirited and anti-immigrant. They are right, . . ."); Salholz, *Say It in English*, NEWSWEEK, Feb. 20, 1988, at 22 ("It's a real cover for bigotry," says Frederick Erickson, a sociolinguist at the University of Pennsylvania.)

16. See, e.g., Trombley, *California Elections: English-Only Proposition Kindles Minorities' Fears*, L.A. Times, Oct. 12, 1986, at 1, col. 1 ("Supporters of the proposition believe that English must be made the 'official language' in order to provide some unity and cohesiveness in a rapidly growing state in which more than 100 languages are spo-

legislature and private citizens to have a hand in its enforcement, there has been considerable confusion about its practical effects. Opponents feared that the provision would destroy bilingual education, bilingual ballots and bilingual emergency services, and perhaps even eliminate all public use of any non-English language.<sup>17</sup>

In the four years since the provision passed, few of these fears have been realized.<sup>18</sup> The legal effect of Proposition 63 has been minimal. In the most significant legal challenge to an English-Only rule since Proposition 63's passage, a bilingual clerk in a Southern California municipal court successfully challenged a rule that forbade employees to speak any language other than English, except when acting as translators. In *Gutierrez v. Municipal Ct. of S.E. Judicial Dist.*,<sup>19</sup> the Ninth Circuit held that the English-Only rule was a violation of employee rights under Title VII's prohibition of employment discrimination on account of national origin.<sup>20</sup> In deciding the case strictly on Title VII grounds, the Court dismissed Proposition 63's application to this particular fact situation.

Section 6 (Proposition 63) does not provide that English must be spoken under the circumstances specified in the municipal court's rule, or even suggest that such should be the general policy of the state. . . . While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting and strengthening the English language.[ ]<sup>21</sup>

In January of 1989, Alma Gutierrez settled with the county for

ken."); Will, *In Defense of the Mother Tongue*, NEWSWEEK, July 8, 1985, at 78 ("The government has a constitutional duty to promote the general welfare, which . . . is linked to a single shared language. Government should not be neutral regarding something as important as language is to the evolution of the culture").

17. See Overbea, *California vote speeds U.S. drive to make English 'official'*, The Christian Science Monitor, Dec. 17, 1986, at 5, col. 1.

18. See *infra* notes 42-47 and accompanying text.

19. 838 F.2d 1031 (9th Cir. 1988), *rehearing en banc denied*, 861 F.2d 1187 (9th Cir. 1988), *vacated* 109 S.Ct. 1736 (1989). The plaintiff in Gutierrez had been fired for speaking Spanish to a fellow employee when not translating. Earlier, a co-worker had complained that the employees often conversed in Spanish when wishing to exclude non-Spanish speaking employees or when ridiculing non-Spanish speaking employees. 861 F.2d at 1188 (Kozinski dissenting).

20. Gutierrez, 838 F.2d at 1036-39 ("Title VII forbids not only intentional discrimination with respect to conditions of employment, but also facially neutral rules that have a disparate impact on protected groups of workers. . . . Few courts have evaluated the lawfulness of workplace rules restricting the use of languages other than English. Commentators generally agree, however, that language is an important aspect of national origin."). But see *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (upholding a Texas employer's rule prohibiting his lumber supply store employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers), *cert. denied*, 449 U.S. 1113 (1981); Gutierrez, 861 F.2d at 1187 (Kozinski dissenting).

21. Gutierrez, 838 F.2d at 1043-44.

\$85,000,<sup>22</sup> and in April of 1989, the Supreme Court vacated the decision and remanded the case to the Ninth Circuit, ordering it to dismiss the decision as moot.<sup>23</sup>

Despite the snail-like pace with which Proposition 63 has been implemented, the efforts at challenging the provision have focused on rights that have been denied, the provision's discriminatory intent and existing federal statutory and constitutional law limits.<sup>24</sup> In the short run, this approach certainly will benefit the 19.4 million Hispanics<sup>25</sup> in the United States, along with members of other language minority groups; however, this approach will not undo the predominant harms of English-Only statutes and constitutional amendments.

It strikes me initially, in my own experience, that the battle over English Only is personal, bitter and involves a choice between letting people stay whole or fragmenting their souls and their families. In addition, while formal legal rights challenges to English-Only rules may be successful, the ramifications are much more subtle. The stigma that English-Only provisions place on members of language minorities, and the closely related infringement on personal identity, are the principle harms of English-Only statutes and constitutional amendments. Prohibitions against these harms are embodied in the United States Constitution's equal protection clause and right to privacy.<sup>26</sup>

---

22. *Savage, Justices to Hear Swaggart Tax Case*, L.A. Times, Apr. 18, 1989, at 4, col. 4.

23. *Gutierrez v. Municipal Court of S.E. Judicial Dist.*, 109 S.Ct. 1736 (1989). Each side claimed victory. Alma Gutierrez had her \$85,000 and the satisfaction that the judges' lawyers had asked the Supreme Court to reverse the Ninth Circuit. English-Only proponents had a decision that belittled Proposition 63 vacated. *Savage, supra* note 22. In addition, in what appears to be a response to the Gutierrez decision, the California Legislature has passed a bill making "it an unlawful employment practice for private employers to require employees to speak only English while on the job unless such a rule can be justified by business necessity." Gillam, *Sacramento File: Governor*, L.A. Times, Sept. 14, 1989, at 38, col. 1.

24. For a discussion of this approach, see Note, "Official English": *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987).

25. McLeod, *supra* note 7.

26. U.S. CONST., amends. I, III, IV, V, IX, XIV. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). The applicability of the equal protection clause to state and federal discrimination against "discrete and insular minorities" is clearly recognized. *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4. (1938)(dictum). The key question then becomes what constitutes discrimination protected by this clause. The two harms that discrimination is thought to perpetuate are access (*Id.*) and stigma. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954)(segregation may generate a feeling of inferiority that stigmatizes a minority group). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1477 (2d ed. 1988)("The most obvious rationale for the holding in *Brown I* is also the most persuasive. Racial separation by force of law conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed"). The right to privacy was established by *Griswold*, and at least some commentators, if not the Supreme Court, have recognized the right to privacy as protecting an individual's right to self-definition. I will

was made because "the vast majority of Hispanics today buy, work and conduct their business in English. It is a safe statement to say that successful Hispanics speak English."<sup>34</sup>

Some groups that argue sufficient incentives already exist for English acquisition among non-English speakers point out that the English-Only movement's efforts have not focused on measures that would increase English acquisition. The English Plus Information Clearinghouse, a coalition of groups opposing English-Only efforts, has charged that English-Only advocates "seem to have little interest in practical steps to promote English acquisition."<sup>35</sup>

They [English-Only advocates] decline to support legislation that would increase federal aid for adult ESL [English as a Second Language], arguing that private groups—such as Spanish-language media—should shoulder the entire responsibility.

Fortunately, the U.S. Congress disagrees. It is now on the verge of passing the English Proficiency Act, which would authorize \$25 million a year for adult English classes . . .<sup>36</sup>

The second approach of English-Only opponents is the discriminatory intent approach, which attacks the provisions as applied. It is important to recognize that this approach focuses on the narrow definition of discriminatory intent embodied in current equal protection jurisprudence, which emphasizes the motives of those who promulgated the statute.<sup>37</sup> Rarely do courts expect to find explicit discriminatory intent.<sup>38</sup> Legislative histories generally do not contain statements such as, "Hispanics are inferior, they shouldn't be able to use Spanish in public or exercise any rights." Instead, courts sometimes infer discriminatory intent from an unlawful purpose or unlawful means.

English-Only opponents think they have found discriminatory intent both in the social context in which the English-Only provisions have been enacted—increasing Hispanic populations and immigration<sup>39</sup>—and in the explicit writings of U.S. English officials.

34. *Id.* Estrada also said that 72% of Latinos in the United States speak English.

35. *Nationwide Debate Grows over English Language Amendments*, English Plus Information Clearinghouse Newsletter, March/April 1988 at 3, 4.

36. *Id.* at 4.

37. *Washington v. Davis*, 426 U.S. 229 (1976). The discriminatory intent doctrine is applied only in cases where plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

38. See L. TRIBE, *supra* note 26, at 1466 (The classic case for identifying government's treatment of a group as prejudicial appears in those legislative and administrative promulgations which on their face officially disadvantage members of racial and ancestral minorities as such).

39. See, e.g., Salholz, *supra* note 15, at 22.

Critics of U.S. English say the movement is a backlash against America's newest immigrants—Asians and, especially, Hispanics. "It's a real cover for bigotry," says Frederick Erickson, a sociolinguist at the University of Penn-

In this article, I will argue: (1) that the English-Only movement is about supremacy of culture and heritage as well as language; (2) that having the state recognize the "inferiority" of Hispanic culture, heritage and language has stigmatized (and discriminated against) Hispanics; and (3) that these injuries are protected through the equal protection clause and the right to privacy in the United States Constitution. First, however, I will briefly address the current legal efforts of those opposing Proposition 63 as well as English-Only measures in other states.

### I. THE CURRENT APPROACH OF ENGLISH-ONLY OPPONENTS

*When I was a junior in college, my grandfather had a stroke. He spent more than two weeks in a hospital. For longer than either of us was comfortable with, he couldn't really say a word. Not in English. Not in Spanish.*

*When I was in graduate school in Los Angeles, I spent what seemed like a week in a local bank trying to set up a new account. It was only an afternoon. On one of the many forms I had to fill out—in triplicate—I had to write down my mother's maiden name—I guess to differentiate myself from all the other Wendy Olsons in Los Angeles. O-r-t-e-g-a. The account person smiled at me, and said something that began with "Donde vive su familia?"<sup>27</sup> I could only shake my head as the account representative shook hers. In the year to come, I would often hear business in that bank transacted in Spanish. And I would see, probably in my imagination, the knowing glare of my account representative. "There's the Ortega girl who cannot speak Spanish."*

*Oh yes, I got the account. I also got a not-so-gentle reminder of the limits placed on possession of my Hispanic identity.*

There are three main methods advocated for stopping the English-Only movement.

The first method attempts merely to point out, correctly, that the measures are not needed in order to encourage non-English speakers to learn English and that, thus, the English-Only movement cannot realistically be interpreted to be encouraging immigrants to learn English.

In south Florida, a 1988 survey found that a slightly higher percentage of Hispanic than non-Hispanic parents thought it important for their children to read and write in perfect English. Also, enrollment in Dade County adult English classes increased sixty percent from 1986 to 1988.<sup>28</sup>

---

argue that this right to self-definition includes the right to define one's self in terms of the language one speaks. See *infra* notes 154-62 and accompanying text.

27. Where does your family live?

28. Salholz, *supra* note 15, at 23.

In Suffolk County, New York, a state legislator was ultimately rebuffed in his plans to start a campaign to make English the official language of the county.<sup>29</sup> Angry letter writers to the New York daily *Newsday* argued that non-English speakers in Suffolk County already were trying to learn English.

One important factor that escaped Legis. Joseph Rizzo and *Newsday's* Bob Wiemer in his column was the huge registration for evening English classes that took place this past September. Every center teaching English as a Second Language not only filled its classes but also needed to make long waiting lists. Those who say, "Hispanics don't want to learn English," haven't done their homework.

While Rizzo and his supporters rant about an imaginary problem, many of our churches, colleges, schools and BOCES centers quietly look to the needs of people victimized by our failed foreign policy in Central America. During a 12-hour period, at least one of these centers is busy teaching new immigrants citizenship, English or skills for occupational careers. . . .

In this century, as each Hispanic group approached assimilation along came a new wave of Hispanics, giving the public an impression that no progress was made in English by the previous group. But progress is taking place for Hispanics. We all know that academic, economic and political progress can only come with knowledge of English. This doesn't have to be legislated, it's plain common sense.<sup>30</sup>

People for the American Way, a Washington, D.C.-based constitutional liberties group, have joined the English-Only opposition in using as one of its tactics the argument that "the English-under-siege argument is simply wrong".<sup>31</sup> Mary Nichols, People for the American Way director for California, recently pointed to a 1985 RAND Corp. study that found that "among first-generation Americans whose mother tongue is Spanish, ninety percent are proficient in English and fifty percent of their children can't speak Spanish."<sup>32</sup>

*Hispanic* magazine, a Washington-based Latino monthly which began publishing in March of 1988, publishes in English. By July of 1988 the magazine had a circulation of 150,000 and requests for new subscriptions were coming in at a rate of 2,000 a month.<sup>33</sup> Editor Alfredo Estrada said that the decision to publish in English

---

29. Brand, 'English-Only' Bill Loses; Suffolk Legislature Defeats Plan After Heated Debate, *Newsday*, Apr. 25, 1989, at 5.

30. Lebron, *Immigrants Want to Learn to Speak English*, *Newsday*, Jan. 23, 1989, at 53 (letter to the editor); see also Chen, *Letter to the Editor*, *N.Y. Times*, Sept. 29, 1989, at A34, col. 4.

31. Nichols, *The English-Only Movement Legitimizes Attacks on Brotherhood and Tolerance*, *L.A. Times*, Feb. 19, 1989, at E5, col. 1.

32. *Id.*

33. Abrams, *Magazines: Fast Start for a Latino Monthly*, *L.A. Times*, July 21, 1988, at E1, col. 5.

A 1986 memo from John Tanton, a Michigan ophthalmologist and one of U.S. English's founders, made several discriminatory comments about Hispanics.

Is apartheid in Southern California's future? The demographic picture in South Africa now is startlingly similar to what we'll see in California in 2030. In Southern Africa, a White minority owns the property, has the best jobs and education, has the political power, and speaks one language. A non-White majority has poor education, jobs and income, owns little property, is on its way to political power and speaks a different language. . . .

Will Latin American migrants bring with them the tradition of mordida (bribe), the lack of involvement in public affairs, etc.?<sup>40</sup>

Although I believe that the English-Only movement does intend to discriminate against Hispanics, I find this approach unsatisfactory for two reasons. First, it focuses too much on the actions of the English-Only proponents and not upon the stigmatic harm inflicted upon members of language minorities.

Second, because it focuses too much on English-Only proponents, it leaves in place the equal protection jurisprudence that focuses almost exclusively on discriminatory intent, which is exceedingly difficult to prove.<sup>41</sup>

The third approach is what I call the rights-based approach, which attacks English-Only provisions as they are applied, as in the *Gutierrez* case. This approach uses other rights and existing limitations on the infringements of those rights—e.g., Title VII's prohibition of national origin discrimination in employment—to strike down application of English Only to areas such as voting, employment, education and access to emergency services. In essence, the English-Only opponents here are piggybacking on other protected rights.

As a matter of practicality, this may be the most effective approach for protecting the rights of non-English speakers in U.S. society. For example, regardless of the rhetoric employed, federal bilingual education statutes limit what the California legislature can do to bilingual education on a statewide level.<sup>42</sup> Although the state

---

sylvania. "It's easier to say we're afraid of English being overwhelmed than to say we don't want any more spics around here."

40. Memorandum from John Tanton to WITAN IV Conference participants (Oct. 10, 1986)(copy on file with author).

41. For alternative approaches, see Lawrence, *supra* note 37; Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); and *infra* notes 141-44 and accompanying text.

42. Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f)(1982). This is not to suggest that everything that falls under the rubric of "bilingual education" is of equal merit. There are, of course, a variety of approaches to bilingual education, including, for example, "immersion" and "transitional bilingual education." The various ap-

no longer provides bilingual ballots upon request for all voters,<sup>43</sup> the state must provide bilingual ballots in a precinct where five percent or more of the population speaks a language other than English.<sup>44</sup> In addition, the Ninth Circuit, interpreting the National Labor Relations Act, held in 1987 that Southern California's largest hotel workers' union must provide Spanish translations at its meetings and that Hispanic workers' most fundamental representation rights were jeopardized when they could not participate in union policy discussions.<sup>45</sup> And the *Los Angeles Times* reported in early 1987 that the federal Department of Health and Human Services' Office of Civil Rights was monitoring a Southern California hospital to make sure it abides by an agreement to settle charges that it discriminated against patients who could not speak English.<sup>46</sup> Title VI of the Civil Rights Act of 1964 prohibits discrimination against patients in hospitals that receive public money in the form of grants or Medicare or Medi-Cal payments.<sup>47</sup>

A federal district court already has found the Arizona Consti-

---

proaches differ as to how much of the student's instruction is in her primary language, and how much is in English. Ursula Casanova, a post-doctoral fellow at Stanford University's Center for Chicano Research, says

I place "bilingual education" in quotes because it has come to mean so many different things. Although the term itself implies instruction in two languages, its application is inconsistent. Bilingual education is used to mean any configuration of languages used to instruct "bilingual students." No matter that many, if not most, of those students are monolingual in their native language, and no matter that some of those instructional configurations totally ignore the native language in the educator's anxiety to teach English.

Casanova, *Latinos and Educational Policy: Regaining the Initiative*, paper presented at the Summer Orientation Session of the Hispanic Leadership Opportunity Program, July 7, 1988 (copy on file with author).

An in-depth analysis of the merits of various bilingual education programs is beyond the scope of this paper. Bilingual education will be addressed only as it is related to English-Only efforts.

43. The Hispanic population of Santa Clara and San Mateo counties does not exceed 5%. Interview with Santa Clara County registrar of voters (Feb. 28, 1989). Thus, the Voting Rights Act of 1975 does not guarantee Hispanic voters in these counties use of bilingual ballots. See *infra* note 44 and accompanying text.

44. Voting Rights Act of 1975, 42 U.S.C. § 1973aa-1a (1988 supp.).

45. *Zamora v. Local 11, Hotel Employees and Restaurant Employees Int'l Union*, 817 F.2d 566 (1987); see also Murphy, *Hotel Union Must Use Translator, Court Rules*, L.A. Times, May 22, 1987, at B1, col. 2 ("... lawyers in the case said [the decision] is likely to have a broad effect on the ability of Latinos, Asians and other minority members throughout the Southwest who may have been barred from active union membership by language barriers").

46. Faris, *U.S. Agency Monitoring Hospital on Bias Accord*, L.A. Times, Feb. 12, 1987, at I1, col. 1.

Among other things, the hospital is required to develop programs to train and test volunteer medical interpreters, appoint a coordinator of bilingual services, review existing Spanish-language medical material and determine whether more should be made available, and ensure that the public knows that interpreter services are available. It also must clarify its policy on where English must be spoken in the hospital.

*Id.*

47. 42 U.S.C. §§ 2000d *et seq.*

tion's English-Only provision<sup>48</sup> unconstitutional. In *Yniguez v. Mofford*, the court held that the English-Only provision governing use of English by state workers was "so broad as to inhibit the constitutionally protected speech of third parties."<sup>49</sup>

Thus, proponents of the rights-based approach have several weapons to wield in a case-by-case attack on English-Only provisions. The problem with this is threefold. First, it requires each individual who wishes to attack English-Only provisions to place herself in the role of victim<sup>50</sup> and engage in litigation. Not only might such a process be onerous for the plaintiff, but it is also expensive and could be quite a burden on the portion of the legal community that traditionally has represented Hispanic causes. In addition, prospective plaintiffs, because of the mere *existence* of the English-Only provision, might not realize that their rights have been infringed upon.<sup>51</sup>

Second, because this method takes a case-by-case approach, there is no guarantee that litigation will be initiated in all situations where rights are impinged upon by English-Only provisions. There might not be adequate evidence for discrimination actions under existing federal statutes such as Title VI or Title VII of the Civil Rights Act of 1964 or the Voting Rights Act of 1975.<sup>52</sup> Further-

48. *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990).

49. *Id.* at 314.

50. See Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987).

51. In one of the interviews discussed in more detail in part III, a Latino from East Palo Alto, California, told me of an incident in which this was the case. He and his brother had gone to a local social security office where an older Hispanic gentleman had just been turned away from the window because he did not speak English. It did not occur to him to challenge the action because he knew English was the state's official language. Interview with Luis (Feb. 10, 1989) (transcript on file with author) [hereinafter Luis interview].

Similar incidents have been reported in press accounts of the aftermath of English-Only initiatives' passage in Florida and California. *Newsweek* magazine reported that Los Angeles shelters have refused to accept non-English-speaking homeless people. Salholz, *supra* note 15, at 23. The *Christian Science Monitor* reported the following incidents three weeks after the English as the official language amendment was approved by Florida voters.

In Miami, news director Tomas Garcia-Fuste of Spanish-language radio station WQBA claims to have received dozens of complaints a day such as these:

A man placed a collect call last week, which was accepted by a woman speaking Spanish. The operator refused to let it go through, however, insisting that such calls could only be accepted now in English.

A woman called a department store to place a catalog order. When she began in Spanish, as she had in the past, a clerk cited the official English law and hung up.

Ingwerson, *Critics say incidents demonstrate prejudice behind statutes*, The Christian Science Monitor, Nov. 29, 1988, at 3, col. 3.

52. The Voting Rights Act of 1975 proved inadequate in keeping the English-Only provisions off the ballots in Colorado and Florida. In both states, prior to the November 1988 election, lawsuits were filed to keep the measures off the ballot because,

more, the federal protection of bilingual education provides only minimal protection. Funding above the federal provision could be wiped out at the state level by English-Only proponents.<sup>53</sup> In addition, there are some rights or entitlements that are not protected by existing federal law, including the right to have a translator at a civil, as opposed to a criminal, trial.<sup>54</sup>

Third, and most importantly, this approach would leave the

---

claimed those who brought the lawsuits, petitions to put the measure on the ballot were circulated only in English, in violation of the federal statute. *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988)(Florida case); *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988)(Colorado case). Both circuits held that circulation of the petitions only in English did not violate the Voting Rights Act. In Florida, the appellate court upheld a district court denial of an injunction to keep the measure off the ballot. *Delgado*, 861 F.2d at 1489 (holding that the Voting Rights Act does not apply to initiative petitions and the involvement by the state officials in the initiative process does not constitute state action). In Colorado, the Tenth Circuit reversed a district court's grant of an injunction. *Montero v. Meyer*, 861 F.2d at 603 (holding that the District Court erred in finding that the Voting Rights Act applies to the initiative process). The District Court in *Montero* had relied on a Justice Department regulation applying the Voting Rights Act to the initiative process. 28 C.F.R. § 55.19(a). The Justice Department also supported the Florida plaintiff-petitioners in their efforts to have the English-Only measure removed from the ballot on Voting Rights Act grounds. *Encourage English; Don't Force It*, N.Y. Times, Nov. 7, 1988, at 18, col. 1.

In addition, the Seventh Circuit recently held that the National Labor Relations Board's decision not to print representation election ballots in all languages used in the workplace is within its discretion under the Nation Labor Relations Act. *NLRB v. Precise Castings, Inc.*, No. 89-3560 (7th Cir. 1990). Furthermore, the Supreme Court's recent decision in *Ward's Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), making it more difficult for plaintiffs to make a Title VII disparate impact claim, reduces Title VII's effectiveness as a tool for fighting English-Only workplace rules. Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 414-29 (1989).

53. There are some indications that this, indeed, has happened. See, e.g., Chambers, *supra* note 8 ("No sooner had the voters here overwhelmingly made English the official language of California than the campaign's sponsors began preparing legislation to put an end to bilingual education in the state"). In the summer of 1987, when California's state bilingual education act expired, the state Legislature appropriated money for an additional five-year program, but the bill was vetoed by Gov. George Deukmejian. Paddock, *Deukmejian Vetoes Bill to Revive Bilingual Program*, L.A. Times, July 25, 1987, at 1, col. 5. In 1988, bilingual education supporters in the state Legislature abandoned efforts to revive bilingual education programs when it became clear that support of the program would endanger special education funding and that Deukmejian would again veto bilingual education funding at the state level. Wolinsky, *Backers Give Up Their Bid to Revive Bilingual Education Program*, L.A. Times, June 10, 1988, at A3, col. 5. Also, members of Congress who have supported efforts to make English the nation's official language have set their sights on undoing bilingual education. *The English Language Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 8 (1984) [hereinafter *Hearings*] (statement of Sen. Jeremiah Denton) (Unfortunately, however, bilingual education is no longer a transitional means of teaching immigrant children. Rather it has become a practice that promotes the preservation of separate cultural identities while, at the same time, alienating the immigrant from the mainstream of American society).

54. *Jara v. Municipal Ct.*, 21 Cal.3d 181, 578 P.2d 94, 145 Cal. Rptr. 847 (1978), *cert. denied*, 439 U.S. 1067 (1979). For an ironically humorous account of which rights are and which rights are not protected against a language barrier, see Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 890-95 (1986).

English-Only statutes and constitutional amendments “on the books.” The Ninth Circuit opinion in *Gutierrez* embodies this result.

While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language.[ ]<sup>55</sup>

The court here is giving implicit support to the symbolic effect of a California constitutional provision that preserves, protects and strengthens the English language. The question thus becomes, why does the English language need preserving, protecting and strengthening?

## II. ENGLISH ONLY AS A SYMBOL FOR ANGLO CULTURE ONLY

*I have cousins who are Ortegas, my mother's brother's children. One of them is actually a blonde. She's writing a biography of my grandfather for a project at Brigham Young University. Last Christmas she and her brother and sister gave my grandfather a Linda Ronstadt tape for Christmas—"Canciones de mi padre".<sup>56</sup> My siblings and I had given my grandfather tapes for his birthday, only six weeks earlier—Glen Miller and his orchestra.*

The English-Only movement starts from the assumption that there is something in the fabric of this country that needs to be protected from too much non-English. This assumption raises two questions: (1) can that something in the fabric of this country that needs to be protected realistically be the English language?; and (2) if it is not the English language, what is it?

The answer to the first question depends on whether language itself has intrinsic worth. Independent of other factors, can one language be worth more than others? Is there a hierarchy of language? In what meaningful way can one language be worth more than another? In what meaningful way can “si” be more powerful than “yes”?<sup>57</sup>

Perhaps the only meaningful way one language can be stronger than another is if more people speak it. So when proponents of English Only state that English is threatened, they must mean that not enough people speak it.<sup>58</sup>

55. *Gutierrez*, *supra* note 21.

56. Songs of my father.

57. Just imagine the battle between “no” and “no”.

58. In congressional hearings on a proposed amendment to the U.S. Constitution that would make English the nation's official language, a number of proponents banded off different numbers that seem to indicate some of the parameters of this “enough” line. See, e.g., *Hearings*, *supra* note 53, at 9 (statement of Sen. Jeremiah Denton)(For

What, then, is this magical number of "enough" people? And why should English speakers care whether non-English speakers learn English?

At this first level, English is the key to unlocking the doors to success in the United States. For proponents of English-Only provisions, giving immigrants the key to unlocking these doors is their grand act of paternalism. Alabama Sen. Jeremiah Denton, in his support of a federal constitutional provision declaring English the official language, said that the current bilingual policy of the nation is "discriminatory in nature. There is no room for upward mobility in a society if one does not speak the language. Were English to be made the official language of the U.S., however, all our citizens would be stimulated to learn English."<sup>59</sup>

As discussed in Part I, one of the current approaches of opponents of the English-Only movement stresses the fact that English is not threatened and that a majority of immigrants and non-English speakers still recognize the central place English has in this society.<sup>60</sup> Moreover, writing more than two decades ago, Arnold Leibowitz said that the implicit premise in American law was that English is the official language of the United States. "The practical compulsions to know English in order to participate fully in other areas of American life are sufficiently great that they need not be reinforced artificially by statute."<sup>61</sup>

---

example, over 10 million Americans can speak only Spanish and, if current trends continue, by the year 2030 more than half of California's population will be Spanish speaking). Sen. Walter D. Huddleston of Kentucky, and one of the sponsors of the proposed amendment cited a private market research survey that shows that 43% of the U.S. Hispanic population speaks only Spanish, or just enough English to "get by." *Id.* at 21. Based on the recent Census Bureau report on Hispanic population, Sen. Huddleston's figure would put the percentage of those in the United States who speak no English at more than fifty percent. *See supra* text accompanying note 25.

59. *Hearings, supra* note 53, at 10.

60. While market mechanisms certainly exist to promote the use of English by upwardly mobile Hispanics, market mechanisms also have embraced bilingualism. Advertisers are bending over backward to reach Hispanic markets through use of Spanish-language media. Regardless of what language they speak, 19.4 million Hispanics are a market. *See Abrams, supra* note 33. In addition, in the 1988 presidential election, both George Bush and Michael Dukakis courted the Hispanic vote. *Id.* Dukakis even delivered portions of his acceptance speech at the Democratic National Convention in Spanish. Nelson, *Dukakis Pledges to Lead U.S. to 'A New Era of Greatness'; Heaps Scorn on Record of Reagan Years*, L.A. Times, July 22, 1988, at 1, col. 6. During the campaign, both Bush and Dukakis expressed their opposition to the English-Only movement. *Encourage English; Don't Force It*, N.Y. Times, Nov. 7, 1988, at 18, col. 1.

The English-Only provisions have sometimes acted as an artificial barrier on these natural market mechanisms. *Advertising Age* magazine reported in September of 1987 that a Spanish language AM radio station in Colorado Springs, Colorado, folded because proposed English-Only legislation scared away potential advertisers. *Special Report: Hispanic Marketing: Hispanic Tangents*, ADVERTISING AGE, Sept. 28, 1987, at S-23.

61. Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 8 (1969).

So if English *qua*<sup>62</sup> English is not the something that needs to be protected from too much non-English, what is that something?

The answer seems to lie in the connection between language and culture. It is "American" culture that needs to be protected from too much non-English. The problem here is in what the English-Only proponents define as "American" culture.

The link between language and culture, and this link's concomitant impact on personality,<sup>63</sup> is quite well documented by psychologists, sociologists and, increasingly, by legal scholars.

The relationship between language, culture and self-identification also can be thought of as a two-step process. In the first step, language is seen as an important group- and self-identifying characteristic. In the second, self-identification with a particular group or culture is seen as an important developmental process.

A 1987 study by a doctoral candidate at the University of California-Berkeley showed that an individual's use of language may reflect principles highly valued in the culture in which that language is dominant.<sup>64</sup> Researcher Philip Hull gave the California Psychological Inventory to forty-one Hispanic bilingual undergraduates,<sup>65</sup> first in their native language and again in English five to fifteen days later. Hull found that the forty-one

scored higher in English than in Spanish in categories including social presence, self-acceptance, well-being and achievement. Hull says this reflects the value placed on individual achievement in the United States, . . . In English, likewise, the bilinguals scored lower in self-control and desire to create a good impression—qualities that are more highly valued in their native culture.

"Traditional personality theories don't place a high emphasis on language as an indicator of personality," Hull says. "But based on these findings, you would predict that behavior will differ according to the linguistic context."<sup>66</sup>

Sociologists and linguists have long seen language as an indicator of group identification,<sup>67</sup> as well as a means of distinguishing the self from others in social identification.<sup>68</sup> The authors of a 1976 Southern Illinois University law review article used this theory in

62. *as.*

63. The interplay between language, culture and personality is important to an individual's concept of self-definition, which will be explored *infra* part III, notes 106-27 and accompanying text.

64. Simon, *Dr. Jekyll, Senor Hyde*, PSYCHOLOGY TODAY, Dec. 1987, at 16.

65. The subjects of the research were identified as "coordinate bilinguals," all of whom did not learn English until after their eighth birthdays and all of whom scored well on the Test of English as a Foreign Language. *Id.*

66. *Id.*

67. See, e.g., K. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION (2d ed. 1966); J. FISHMAN, THE SOCIOLOGY OF LANGUAGE 4 (1972).

68. See, e.g., M. PEI, THE STORY OF LANGUAGE 259 (rev. ed. 1965).

calling for language choice as a fundamental international human right.<sup>69</sup>

The concept of human dignity is fundamentally linked to the life of the mind which in turn is closely linked to language as a basic means of communication. Language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity.<sup>70</sup>

If language is seen as important for group- and self-identification, the question becomes to what extent group- and self-identification are important developmental and psychological processes.

Erik Erikson has described a phenomenon in which members of groups see themselves as "true" individuals and members of other groups as somehow inferior. He calls this process "pseudo-speciation."<sup>71</sup> In a subsequent writing, Erikson said that the "pseudo-speciation" process occurred fairly early in an individual's life.

It is only a seeming paradox that newly born Man, who could, in principle and probably within some genetic limits, fit into any number of pseudo-species and their habitats, must for that very reason be coaxed and induced to become "speciated" during a prolonged childhood by some form of family: he must be *familiarized by ritualization* with a particular version of human existence. He thus develops a distinct sense of corporate identity, later fortified against the encroachment of other pseudo-species by prejudices which can make very small differences in ritualization extraspecific and, in fact, inimical to the only "genuine" human identity. (emphasis in original).<sup>72</sup>

Time and again, Erikson stresses the good as well as the bad potential in pseudo-speciation. Although the ritualization experiences that give individuals a pseudo-species give individuals a sense

To the naive monoglut, objects and ideas are identical with and inseparable from the particular words used to describe them in the one language he knows; hence he is inclined to consider speakers of other languages as something less than human, or at least foreign and hostile to the world of his own experience.

*Id.*

69. McDougal, Laswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, S. ILL. L. REV. 151 (1976).

70. *Id.* at 151.

71. E. ERIKSON, *LIFE HISTORY AND THE HISTORICAL MOMENT* 176 (1975). Erikson says that this trend of man's division into pseudo species denotes:

the fact that while man is obviously one species, he appears and continues on earth split up into groups . . . which provide their members with a firm sense of God-given identity—and a sense of immortality. This demands, however, that each groups must invent for itself a place and a moment in the very center of the universe where and when an especially provident deity caused it to be created superior to all others, the mere mortals.

*Id.*

72. E. ERIKSON, *TOYS AND REASON* 79-80 (1977).

of identity, that sense of identity also gives individuals a yardstick by which to evaluate the ritualization experience of others.

At its unfriendliest, then, "pseudo" means that somebody is trying with all the sincerity of propaganda to put something over on himself as well as on others; and I am afraid that I mean to convey this, too, wherever under the impact of historical and economic displacements a group's self-idealization becomes defensive and exclusive and where, out of fear and pride, existing knowledge is denied, insight prevented, and possible alternatives ignored.<sup>73</sup>

Constitutional law scholar Kenneth Karst stressed the importance of group identity and self-identification while arguing for a constitutional protection of cultural identity.<sup>74</sup> He relies on the work of social philosopher Helen Merrell Lynd, whose work explores how individuals internalize others' views about them.<sup>75</sup>

The individual's identification with cultural groups—ethnic, racial, religious, or language groups—plays a major part in the process of self-definition. In defining ourselves, we rely heavily on others' views of us, real or imagined, and on our connections with others.[] Imagine right now that someone has asked you the question: "who are you?" Perhaps the reader is a Walt Whitman, who would answer, "I am myself, unique in the universe, and I exult in my uniqueness."[] Most of us, however, would likely respond in words premised on the ways in which we are related to others: "I am a mother"; "I am a law student"; "I am Black"; "I am an old man"; "I am a Jew"; or "I am the child of Korean immigrants."<sup>76</sup>

Or, as is important in this case, "I am Spanish-speaking."

In Hawaii, a Hawaiian language professor founded a nursery school that teaches young children the rapidly vanishing Hawaiian language. The language is viewed as the thread by which maintenance of the Hawaiian culture hangs. For Professor Larry Kimura and the students of Punana Leo (the language nest), language is "the foundation of a culture, its way of thinking, its mode of expression."<sup>77</sup>

Although he has been an opponent of bilingual education, Richard Rodriguez, in his autobiography, "Hunger for Memory," poignantly recalls how use of language shaped his young identity.

73. E. ERIKSON, *supra* note 71, at 177.

74. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

75. H. LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* (1958).

76. Karst, *supra* note 74, at 307. Martha Minow also points out that we generally adopt a particular perspective when assessing other individuals. Says Minow, "From the point of reference of this norm, we determine who is deficient and who is normal." Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 12, 24 (1987).

77. Bowman, 'Language Nest' Revives Hawaii Culture for Children, L.A. Times, Oct. 5, 1989, at E4, col. 1.

Spanish privatized while English publicized his childhood.<sup>78</sup> For Rodriguez, the son of Mexican immigrants, Spanish shaped his early family life; it enveloped him and gave him a sense of intimacy. English, however, was the tool of public discourse, and until he could speak English, he could not belong.<sup>79</sup>

But then there was Spanish. *Espanol*: my family's language. *Espanol*: the language that seemed to me a private language. I'd hear strangers on the radio and in the Mexican Catholic church across town speaking in Spanish, but I couldn't really believe that Spanish was a public language, like English. Spanish speakers, rather, seemed related to me, for I sensed that we shared—through our language—the experience of feeling apart from *los gringos*. It was thus a ghetto Spanish that I heard and I spoke. Like those whose lives are bound by a *barrio*, I was reminded by Spanish of my separateness from *los otros*, *los gringos* in power.<sup>80</sup>

English-Only proponents do not need psychological and sociological theories to realize that it is their definition of American culture that is threatened by too much non-English. They recognize immediately the distinction that Rodriguez makes between public and private and would insist that Spanish remain in the ghetto; that speakers of Spanish feel apart from the rest of society.<sup>81</sup>

Comments of English-Only proponents in the press and at Congressional hearings on the English language amendment both are replete with comments about the ties between English language and American culture.

For example, Kentucky Sen. Walter Huddleston said that "cultural pluralism can only continue if we retain our common meeting ground, namely, the English language. If we allow this

78. R. RODRIGUEZ, *HUNGER OF MEMORY* (1983).

79. *Id.* at 15-16.

80. *Id.*

81. English-Only proponents argue gratuitously here that Spanish speakers can escape the language ghetto simply by learning English. See, e.g., *Hearings, supra* note 53, at 10 (statement of Sen. Denton).

The bilingual policy of the government is discriminatory in nature. There is no room for upward mobility in a society if one does not speak the language.

Were English to be made the official language of the U.S., however, all immigrants, all our citizens, would be stimulated to learn English.

*Id.* Sen. Denton's suggestion of forced assimilation parallels the conclusion Rodriguez drew from his experience. Concludes Rodriguez,

[I]ntimacy was not stilled by English. It is true that I would never forget the great change of my life, the diminished occasions of intimacy. . . . If, after becoming a successful student, I no longer heard intimate voices as often as I had earlier, it was not because I spoke English rather than Spanish. It was because I used public language most of the day. I moved easily at last, a citizen in a crowded city of words.

R. RODRIGUEZ, *supra* note 78, at 32.

The question I ask, is, why not eliminate the ghetto? There is already a considerable amount of evidence indicating that Hispanics recognize English is the primary language of discourse in the United States, and that they are eager to learn English. See *supra* notes 28-36 and accompanying text.

bond to erode, we will no longer enjoy the benefits of cultural diversity, but rather, we will suffer the bitterness of ethnic confrontation and cultural separation."<sup>82</sup> Columnist George Will of the proposed U.S. constitutional amendment said:

It would end the pernicious practice of providing bilingual ballots, a practice that denies the link between citizenship and shared cultures. . . . Language is an instrument of intimacy. . . . The government has a constitutional duty to promote the general welfare, which . . . is linked to a single shared language. Government should not be neutral regarding something as important as language is to the evolution of culture.<sup>83</sup>

While English-Only proponents are correct in identifying the relationship between language, culture and self-identity, they have a very narrow definition of culture. It is *their* culture; *their* self-identity. It is Anglo culture.<sup>84</sup> Says Will:

Furthermore [government] should not be bashful about affirming the virtues of "Anglo culture"—including the political arrangements bequeathed by the men of July 4, 1776, a distinctly Anglo group. The promise of America is bound up with the virtues and achievements of "Anglo culture," which is bound up with English. Immigrants, all of whom come here voluntarily, have a responsibility to reciprocate the nation's welcome by acquiring the language that is essential for citizenship, properly understood. . . . American life, with its atomizing emphasis on individualism, increasingly resembles life in a centrifuge. Bilingualism is a gratuitous intensification of disintegrative forces. It imprisons immigrants in their origins . . .<sup>85</sup>

Here, Will is rejecting the idea that an immigrant's origins might have anything to add to "American" culture.

A New York legislator advocating an English-Only provision for Suffolk County also unabashedly admits that what is at stake is American culture that is translated as Anglo culture. Joseph Rizzo contends that rival proposals that would create Spanish-speaking titles in various county departments so that governmental services could be offered in both English and Spanish would "deny the Hispanic community the opportunity to share in the American dream

82. *Hearings, supra* note 53, at 23. English-Only proponents have warmly embraced a famous quote from Theodore Roosevelt: "We have room for but one language here, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house." Henry, *Against a Confusion of Tongues*, TIME, June 13, 1983, at 30, 31. I came across this quotation several times in my research. See, e.g., Will, *supra* note 16; Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987) citing 2 U.S. English, *In Defense of Our Common Language* (informational brochure, n.d.).

83. Will, *supra* note 16.

84. The process at work here is a call for "assimilation to an unstated norm." Minnow, *supra* note 76, at 24.

85. Will, *supra* note 16.

which all other immigrant groups have experienced."<sup>86</sup> For Rizzo, English is the American dream's official language. Said Rizzo, "I think that [County Executive Patrick] Halpin is pursuing a program in this county which would result in the erosion of those values and American traditions which have brought people together over the past 200 years through the common tie of the English language."<sup>87</sup>

When his own measure failed, Rizzo was even more outspoken, stating that voting against his measure was "like spitting on the American Flag."<sup>88</sup>

At least one of the English-Only movement's Congressional critics has called the bluffs of people such as Rizzo, Huddleston and Denton. Denton ironically lost his Senate seat in November of 1986, the same day Proposition 63 passed.<sup>89</sup> Said Rep. Don Edwards, a California Democrat and chairman of the House Subcommittee on Civil and Constitutional Rights, "I think there's a desire to return to a white America where everyone speaks the same language."<sup>90</sup>

English-Only proponents' use of English to protect Anglo culture can also be analyzed as a form of status conflict. In a 1987 University of California-Berkeley law review article, Rachel Moran used status conflict analysis to describe how "participants in the bilingual education controversy have used language as a proxy for the status of their culture, customs and values."<sup>91</sup>

Briefly, in status conflict, one group in society seeks to use the political process legitimize to its own culture, customs and values.<sup>92</sup>

86. Rizzo, *English is the American Dream's Official Language*, *Newsday*, Jan. 10, 1989, at 55.

87. *Id.* Although Rizzo was defeated in his initial attempts to pass an English-Only measure, he has vowed in his current election campaign to reintroduce the legislation. Gray, *Incumbent Has Taxing Agenda; Legis. Rizzo Says He Knows Votes; Rival Sees a Credibility Gap*, *Newsday*, Oct. 19, 1989, at 37.

88. Brand, *supra* note 29.

89. *Short Coattails; The Democrats Take the Senate, But Have They Turned The Reagan Tide?*, *TIME*, Nov. 17, 1986, at 38, 40.

90. Salholz, *supra* note 15, at 23.

91. Moran, *supra* note 82, at 325.

92. J. GUSFIELD, *SYMBOLIC CRUSADE 17-19* (1963).

The crucial idea is that political action can, and often has, influenced the distribution of prestige. Status politics is an effort to control the status of a group by acts which function to raise, lower, or maintain the social status of the acting group vis-a-vis others in the society. Conflicts of status in society are fought out in public arenas as are conflicts of class.

*Id.* at 19. Gusfield writes that status conflict is naturally played out in all kinds of public institutions because of their importance in cultural formation.

In the struggle between groups for prestige and social position, the demands for deference and the protection from degradation are channeled into government and into such institutions of cultural formation as schools, churches, and media of communication. Because these institutions have power to affect public recognition, they are arenas of conflict between oppos-

There is no real need for the political result—statute, administrative regulation or constitutional amendment—to be substantively enforced; it is primarily intended for its symbolic effect. It tells the subordinate group or groups that their customs and values are not recognized in law.<sup>93</sup> In his groundbreaking work in the area, Joseph Gusfield describes the status conflict between “wets” and “drys” during the Temperance movement, which culminated with the enactment of the 18th Amendment and the Prohibition era.<sup>94</sup> Once the Temperance movement had its amendment, the clash over values, which also took place during a period of increasing immigration,<sup>95</sup> was largely reduced. The Temperance movement had asserted the supremacy of its values through the legitimizing effect of law.<sup>96</sup>

Moran described the proponents of bilingual education as also trying to get the law to recognize their customs and values.

[T]he vindication of Hispanics' language, culture and way of life in the Bilingual Education Act was designed to revise the status order. Because the Act's message challenged most people's as-

ing status groups. Their ceremony, ritual, and policy are matters of interest for status groups as well as for economic class.

*Id.* at 175.

93. *Id.* at 21.

As status groups vie with each other to change or defend their prestige allocation, they do so through symbolic rather than instrumental goals. The significant meanings are not given in the intrinsic properties of the action but in what it has come to signify for the participants . . . In symbolic behavior the action is ritualistic and ceremonial in that the goal is reached in the behavior itself rather than in any state which brings it about.

*Id.*

94. J. GUSFIELD, *supra* note 92, at 24-165.

95. In this case, the immigrants were from central and northern Europe and Ireland, all areas in which drinking was much more common than among the United States' white, Anglo protestants. See also O. HANDLIN, *THE UPROOTED* 119, 239 (2d enlarged ed. 1973).

There were times when groups of men, unable to attain their own ends through government and unable to understand their own failure, sought to settle the blame on the foreign-born in their midst. . . . At the point of crisis, the stranger who stood in the way of attainment of some particular objective became the butt of attack. Abolitionists and reformers who found the conservative Irish arrayed against them at the polls, proslavery politicians who made much of the radicalism of some of the German leaders, and temperance advocates who regarded an alien hankering after alcohol as the main obstruction on the way to universal abstinence. . . .

*Id.*

96. J. GUSFIELD, *supra* note 92, at 7-8.

The significance of Prohibition is in the fact that it happened. The establishment of Prohibition laws was a battle in the struggle for status between two divergent styles of life. It marked the public affirmation of the abstemious, ascetic qualities of American Protestantism. In this sense, it was an act of ceremonial deference toward middle-class culture. If the law was often disobeyed and not enforced, the respectability of its adherents was honored in the breach. After all, it was *their* law that drinkers had to avoid.

*Id.* Prohibition, of course, was rarely enforced and was repealed 14 years later. U.S. CONST. amend. XVIII (1919, repealed 1933).

sumptions about status, its symbolic impact was extremely fragile in the absence of any significant changes in school district practices. A wholly discretionary grant program therefore could not fully vindicate Hispanics' status: A mandatory entitlement to bilingual education was necessary. . . . [At about the same time 1977-78], when empirical research failed to demonstrate the effectiveness of bilingual education programs. . . . concerns about official bilingualism and separation reflected pre-occupation with the status of English as the preeminent language of the United States.<sup>97</sup>

Application of status conflict to the bilingual education controversy can be broadened to include the English-Only movement. Status conflict begins when one group sees its customs and values threatened.<sup>98</sup> In the case of English Only, a broad socioeconomic cross-section of Anglo culture is threatened by the increasing immigration and influence of the Hispanic population. This was particularly clear in Florida, where the leader of the English-Only movement said that he "didn't move to Miami to live in a Spanish-speaking province. . . . The Latins are coming up fast. There's a headiness, a certain righteous sense of superiority."<sup>99</sup>

The English-Only movement has taken this threat to Anglo customs and values and sought to have it extinguished by making English the official language. Their current strategy has been to take advantage of state-by-state referenda processes, thus directly reaching out to the population whose culture and language are threatened. However, like the Temperance movement, the English-Only movement has as its goal a national constitutional amendment.<sup>100</sup>

97. Moran, *supra* note 82, at 347-48.

98. J. GUSFIELD, *supra* note 92, at 167.

The distribution of prestige is partially regulated by symbolic acts of public and political figures. Such persons "act out" the drama in which one status group is degraded and another given deference. In seeking to effect their honor and prestige in society, a group makes demands upon the governing agent to act in ways which serve to symbolize deference or to degrade the opposition whose status they challenge or who challenge theirs.

*Id.*

99. Schmalz, *Hispanic Influx Spurs Step to Bolster English*, N.Y. Times, Oct. 26, 1988, at 14, col. 2 (statement of Mark A. LaPorta). A geography professor at the University of Miami generalized LaPorta's comments.

"Something has happened in Miami unlike anything in other United States cities. In just one generation, the Hispanic population has come to dominate. There's no question it has created a backlash."

What especially galls longtime Floridians is not so much what they perceive as Hispanic Americans' slowness to learn English as the fact that native Americans are increasingly finding that they have to speak Spanish. Many of the major corporations here, while not specifically requiring their executives to speak Spanish, say that any executive who wants to flourish should learn it.

*Id.* at col. 1.

100. California Congressman Norman Shumway announced December 1988 that he plans to reintroduce legislation to make English the official language of the United

In addition to being essentially grass-roots movements,<sup>101</sup> both the Temperance and the English-Only movements resemble each other in their relative nonenforcement.<sup>102</sup> In status conflict analysis, both movements are intended as largely symbolic, seeking societal legitimization of one group's customs and values by having those values ritualistically legitimized in law. Thus, once the law has been enacted, the legitimization has been realized, and enforcement becomes almost superfluous.<sup>103</sup>

Whether the analysis is through Gusfield and Moran's status conflict or through the English-Only proponents own words, the something in the fabric of U.S. society that English-Only proponents seek to protect must be identified as the customs and values of Anglo, not "American," culture. There is no reason that "American" culture is not a broad enough concept to include Spanish language, customs and values.<sup>104</sup>

There is, however, reason to believe that a definition of American culture that excludes Spanish language, customs and values unfairly discriminates against and stigmatizes the 19.4 million Hispanics in this country.<sup>105</sup>

### III. ENGLISH ONLY AND SPANISH SPEAKERS AS SECOND-CLASS CITIZENS

*As a gift to my grandfather, I used to try to arrange for him to speak to friends of mine who spoke Spanish. In eighth grade, a family from Colombia moved into our neighborhood, and I would invite their 14-year-old daughter over when my grandfather came to visit. I would sit and watch the two of them speaking Spanish, catching a*

---

States. His announcement came on the heels of official English measures passing in Colorado, Florida and Arizona. *The Nation*, L.A. Times, at 2, col. 5.

101. For the grass-roots origins of the Temperance movement, see J. GUSFIELD, *supra* note 92, at 94-97.

102. Moran, *supra* note 82, at 344-45. For the nonenforcement of English-Only provisions, see *supra* notes 42-47 and accompanying text. English Only also has clearly been a grass-roots movement. Several times, English-Only proponents have sought to make English the nation's official language, and they are likely to do so again, but these efforts have not been nearly as successful as those efforts at the state level. See *supra* notes 5-14 and accompanying text. See also *Hearings*, *supra* note 53.

103. J. GUSFIELD, *supra* note 92, at 7-8.

104. For an account of how American culture is indeed acquiring a Latin flavor, see Lacayo, *A Surging New Spirit*, TIME, July 11, 1988, at 46.

America, the great receiver. From every culture to arrive within its borders, it embraces some new ingredient. Puritan wrath. Black cool. Irish poet-ics. Jewish irony. . . . Nowadays the mainstream is receiving a rich new current. More and more, American film, theater, music, design, dance and art are taking on a Hispanic color and spirit.

*Id.*

105. I suspect that I don't actually count in this figure. I think they usually count me with the Swedes. Make that figure 19.4 million plus one.

*phrase here and there. He seemed to enjoy these visits, always in the privacy of my parents' home.*

*Eight years later, at my college graduation, I asked a friend to address my grandfather in Spanish. At first, he merely replied, "No hablo Espanol," but I guess I had already identified him as an Hispanic. He seemed uncomfortable with such an identification 1,500 miles away from Pocatello. He had never encouraged my mother or her siblings to learn Spanish. I had never heard him speak Spanish outside of his home, or my home, or the home of another family member. In my grandfather's eyes, Spanish is a gift to give in private; in public it has no market.*

In this section, I seek to describe the main injury inflicted upon Hispanics by English-Only statutes and the English-Only movement.<sup>106</sup> That injury is one of stigmatization,<sup>107</sup> or, in the parlance of the infamous decision in *Plessy v. Ferguson*, one of stamping non-English speakers with a "badge of inferiority."<sup>108</sup>

The focus here is on the experience of Hispanics—those who most often are identified either implicitly or explicitly as objects of the English-Only movement. As will be discussed in part IV, the experience of the injury by the injured party is often omitted from Constitutional jurisprudence protecting the rights of minorities. The focus of such jurisprudence is on the intent or motives of the actor.<sup>109</sup> Such a focus, in effect, neutralizes the experience of the injured party. It, in fact, denies the injury if there was not an intent to inflict it. One must understand the injury from the point of view of those who feel it, however, to begin to think about creating an appropriate remedy.<sup>110</sup>

What follows are expressions of how Hispanics experience English-Only initiatives and the English-Only movement, not how Anglos tell them they should experience these institutions. Sometimes I asked the questions; sometimes I took the questions and answers from press accounts of the campaigns surrounding and ef-

---

106. I use the term "main injury" to distinguish this section from the other real injuries—the limitation of rights—inflicted by English-Only statutes. The extent to which I believe these other injuries are a problem is discussed *supra* notes 42-55 and accompanying text.

107. To accept this as the main injury inflicted by English-Only provisions, one must see the close relationship between language, culture and personality outlined in Part III. See *supra* notes 63-85 and accompanying text.

108. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

109. This is the approach taken in *Washington v. Davis*. For a criticism of this approach, see Lawrence, *supra* note 37, at 319; see also *infra* notes 139-46 and accompanying text.

110. Law professor Patricia Williams has done a considerable amount of writing detailing the importance of personal experience in placing legal doctrine in historical, social and political context. See generally Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406-08 (1987).

fects of English-Only legislation;<sup>111</sup> sometimes I have simply repeated stories I have read or heard elsewhere.

Reuben Abrica, a longtime political activist in East Palo Alto and former member of the city council, said that Proposition 63 made him feel like a second-class citizen compared to the rest of U.S. society.

It does make you feel uncomfortable, like you're not being official all the time. Latinos definitely perceive their status as lower than that of whites. There is no question in the average understanding of even highly educated people that Spanish doesn't cut it as a highly valued language. Speaking Spanish is not like speaking French, or Russian, which is now all the vogue. [Proposition 63] is like a put-down, you feel like a second-class citizen sort of. They have all these ways of letting you know the position you occupy in society.<sup>112</sup>

One of the other Hispanics I interviewed in East Palo Alto voiced a similar refrain. "You don't feel as free when you perceive this language limitation. This is the language in which we express ourselves. You have to hold part of you back. You feel less free than the rest of the people in this society."<sup>113</sup>

Hispanics also experience English-Only provisions as an effort to assign their culture and language to an inferior role—or to elevate Anglo culture and language to a superior role. For example, in response to the question, "What do you think the provision of the California Constitution declaring English the state's official language means?", one of the 17 Hispanic Stanford undergraduates replied, "I think it is a signal to non-english [sic] speaking people (or those for whom english [sic]<sup>114</sup> is a second language) that to be included into the structures of this society they have to relinquish a part of their culture."<sup>115</sup> Added one of the Hispanics from East

111. In the process of describing this injury, I analyzed newspaper accounts of Hispanics' reactions to the English-Only provisions, interviewed seven Hispanic residents of East Palo Alto, California, and distributed questionnaires to more than thirty Hispanic students at Stanford University. Seventeen of the questionnaires had been returned at the time of this writing. A questionnaire also formed the basis for my interviews. I would like to thank my Stanford Law School classmate, Anthony Romero, for translating my questionnaire from English into Spanish, and I would also like to thank Reuben Abrica for translating for me during one of my interviews in East Palo Alto, as well as for setting up some of my interviews.

112. Interview with Reuben Abrica (Feb. 10, 1989)[hereinafter Reuben interview]. A similar concern was espoused by Geoffrey Nunberg, a Stanford linguistics professor, who said that English-Only provisions send "a message that [non-English speakers] cannot be trusted to become American like their ancestors did, and their assimilation must be imposed by statute." Salholz, *supra* note 15, at 23.

113. Luis interview, *supra* note 51.

114. Perhaps I am getting caught up in discussions of style in writing, but I can't help but think that not capitalizing "english" on the part of this student was a purposeful attempt to reduce the status of "english" by not giving it the capital letter "E".

115. Other responses to this question from those at Stanford and in East Palo Alto included, "That the historic oppression of Chicano people on the basis of culture is now

Palo Alto, "It makes us see that Hispanics and Latinos are of a lower status. It gives them something else to put us down with."<sup>116</sup>

In response to a companion question, "What do you think the provision means to the white community?", one Hispanic Stanford undergraduate responded, "It tells them that "they" are American and others are foreigners. It gives their racist ideas some validity. It says that English is somehow better than other languages." Responded another student, "[T]his society, regardless of its history of oppression and denial of the people of color who have *contributed* to society, is functioning [on] a principle of white supremacy anyway."<sup>117</sup> (emphasis in original). This latter student, when asked if there was a term she would substitute for the terms "English Only" or "English as the official language" responded with "White is Right."

Luis, a Spanish-speaking custodian in a private school, said he viewed the English-Only measure as a way for proponents of the movement to oppress people and cut them off from developing themselves. "Language is one way we develop ourselves," said Luis. "It is one way of preserving our identity."<sup>118</sup>

One of the most heart-wrenching accounts of the stigmatizing effect of having one's primary language assigned to an inferior status returns us to Richard Rodriguez' account of his childhood. He associated success in the United States with learning English; secondary status and family with Spanish. For Rodriguez, English was the language of public discourse; Spanish of private discourse. Language called for him to be a *gringo* in public; a Mexican only in private.

In public, my father and mother spoke a hesitant, accented, not always grammatical English. And they would have to strain—their bodies tense—to catch the sense of what was rapidly said by *los gringos*. At home they spoke Spanish. The language of their Mexican past sounded in counterpoint to the English of public society. The words would come quickly, with ease. Conveyed through those sounds was the pleasing, soothing, consoling reminder of being at home.<sup>119</sup>

Certainly, much of Rodriguez' discomfort had to do with the

---

being legalized."; "It gives people an excuse to 'bitch' to foreign people."; "It's a means of further marginalizing non-English speaking communities." "It means that it can be used by certain people in political arenas as a tool for marginalizing language minorities. It was definitely aimed at language minorities."

116. Luis interview, *supra* note 51.

117. In response to this question, Reuben Abrica said that the English-Only proponents manipulated the public by giving them a false sense of patriotism, "a false sense of what it means to be an American." Reuben Interview, *supra* note 112.

118. *Id.*

119. R. RODRIGUEZ, *supra* note 78, at 13. See also *supra* notes 72-74 and accompanying text.

lack of acceptance of Spanish outside his home. Based on his own experience, Rodriguez says that bilingualism is injurious to Hispanics. Yet he opposes a constitutional amendment that would make English the nation's official language because Hispanics consider the provision aimed at them. "Our government has no business elevating one language above all others, no business implying the supremacy of Anglo culture."<sup>120</sup>

Tomas Garcia-Fuste, news director of a Spanish-language radio station in Miami, said that he would have been in favor of the English-Only amendment in Florida if he thought people put it on the ballot because they love English. "But," he said, "they put it there because they hate Spanish."<sup>121</sup>

According to press accounts following passage of English-Only provisions in Florida and California, some people have explicitly used the provision to inflict stigmatization on Hispanics. For example, *Newsweek* magazine reported the following incident.

Nancy Puertas was shopping for groceries last month at a north Miami supermarket. In heavily accented English, she questioned a store manager about a price. "That's the problem with you Cubans, you want everything for free," he shouted at Puertas, a self-employed financial adviser who moved to the United States from Ecuador 19 years ago. Chiding him for his rudeness, Puertas asked the man for his name. "You don't have to speak like that—learn English," he told her. "It's 'rude' not 'root'." Then, according to Puertas, the manager pushed his name badge up to her face and taunted: "Do you know how to read and write English?"<sup>122</sup>

*The Chicago Tribune* reported in January 1989, the day after

120. Will, *supra* note 16.

121. Ingwerson, *supra* note 51.

122. Salholz, *supra* note 15, at 22. Prior to passage of Proposition 63, the *Los Angeles Times* ran a feature story on a Hispanic family in Orange County in which the parents, recent immigrants, had limited English skills, while their school-age children were quickly becoming better English-speakers through a bilingual education program at school. The Quinones family had already internalized the message that English is a superior language.

"We know what some Americans say about people like us," says 35-year-old Jannet . . . "They say, 'If they're in America, why don't they speak only English?' They think that maybe we don't want to be real Americans."

Such critics are all wrong, she says. "Why can't we love both of our cultures? This is the American way, too, isn't it?"

Wong, *Speaking the Same Language*, L.A. Times, Aug. 6, 1988, at I1, col. 4. The Quinones family, like many Hispanic families, said it did not oppose Proposition 63, primarily because they did not see the effects such a law might have. "It said English is the No. 1 language in America," says Oscar. "We understand this. You don't need a law to tell people that." *Id.* A *Los Angeles Times* poll in the fall of 1986 found that a majority of Hispanics actually favored Proposition 63, but most, like Oscar Quinones, felt that the proposition merely ratified the fact that speaking English is the key to success in the United States. Trombley, *California Elections: Many Supporters Also Favor Bilingual Education, Ballots; Latino Backing of 'English-Only' a Puzzle*, L.A. Times, Oct. 25, 1986, at B1, col. 1.

Colorado voters approved an English as the official language amendment to their constitution, a school bus driver in Grand Junction told the school children on his bus not to speak Spanish anymore because of the law.<sup>123</sup>

Whether it is enforced by gutting bilingual education<sup>124</sup> or not enforced by striking down an English-Only rule in the workplace,<sup>125</sup> Hispanics do experience English Only as discrimination. They see their language, their customs and their identities stamped with a badge of inferiority. Such an injury is exactly what the 14th amendment's equal protection clause and the right to privacy developed in *Griswold v. Connecticut*,<sup>126</sup> *Roe v. Wade*<sup>127</sup> and their progeny were meant to redress.

#### IV. THE CONSTITUTION, CULTURAL MEANING AND SELF-DEFINITION

*My grandfather believes deeply in the democratic, small d, institutions of this country. For the last two decades he has been an active participant in state Democratic, Big D, politics. In the 1980s, he was almost appointed to a seat in the state legislature. I was in Boise, our state capital, once for a high school mock government session and got to meet the Governor. He mentioned that earlier in the day he had had breakfast with my grandfather. My Spanish-speaking grandfather who believes in these democratic institutions, and although he believes in them a little bit more when Democrats are in charge, he believes in them even when the Republicans are running things. I often wonder if my grandfather thinks these democratic institutions believe in him.*

Understood as attempts to legally enact the superiority of Anglo culture and as stigmatizing Hispanics and others culturally and personally associated with languages other than English, English-Only provisions must be struck down as unconstitutional. The U.S. Constitution offers protection against these measures through jurisprudential theories expounded in three different areas: (1) equal

---

123. Coates, 'English Only' law becomes a matter of interpretation, *Chicago Tribune*, Jan. 15, 1989, at C6. In the same article, an opponent of the Colorado English-Only movement said that a fast-food restaurant manager fired an employee for translating the menu into Spanish for an Hispanic customer and that there were scattered reports of school children telling Hispanic playmates that they had to leave the country because the new law had made them "unconstitutional." The English-Only opponent, Joe Navarro, said the incidents were examples of the "anguish the vote brought from the beginning." In response to these incidents, Colorado Gov. Roy Romer and Denver Mayor Federico Pena issued executive orders warning government employees against using the amendment as an excuse for discrimination. The executive orders have angered some supporters of the amendment. *Id.*

124. *See supra* note 53.

125. *See supra* note 19.

126. 381 U.S. 479 (1965).

127. 410 U.S. 179 (1973).

protection strict scrutiny applied to a suspect classification; (2) equal protection strict scrutiny applied to infringement of a fundamental right; and (3) right to privacy protection of an important element of self-definition. Unfortunately for those seeking immediate impact litigation fodder, each of these three routes to striking down as unconstitutional English-Only amendments also involves slight jurisprudential modifications. On the other hand, alternative, attractive theories closely compatible with the language framework and injury analysis set out in parts II and III of this paper are readily available.

As discussed in Part I,<sup>128</sup> under current equal protection jurisprudence, in order for a state action to receive heightened scrutiny, as in traditional race-based discrimination, it must first create a suspect classification. If such a classification is found, courts follow a two-pronged analysis, determining (1) whether the state action creating the classification serves a compelling state interest and (2) whether the means of implementing the action are narrowly tailored to serve that interest.<sup>129</sup> The first prong is essentially an ends test; courts are to determine whether the purpose of the classification is discriminatory. Here, the court looks to the motives of those promulgating the state action.<sup>130</sup>

The first problem in applying this mode of analysis to English-Only provisions is that, thus far, heightened scrutiny has been applied successfully only to racial and national origin classifications.<sup>131</sup> The task becomes to either treat language as a proxy for race or national origin,<sup>132</sup> or to return to the rationale for creating suspect classification—that such classifications discriminate against discrete and insular minorities<sup>133</sup> on the basis of immutable characteristics.<sup>134</sup>

128. See *supra* notes 37-40 and accompanying text.

129. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

130. *Washington v. Davis*, 426 U.S. 229 (1976). The traditional competing view to the discriminatory intent doctrine is disproportionate impact, which would render unconstitutional legislation that disproportionately disadvantages one group. See, e.g., Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 57 (1977); Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 43 (1976)(applying disproportionate impact test to uneven voting power because such unbalance produces discrimination in other areas).

131. L. TRIBE, *supra* note 26, at 1465.

132. As indeed was the case in *Gutierrez*, 838 F.2d 1031, where language was treated as a proxy for national origin discrimination in the Title VII unemployment discrimination context. See *supra* notes 19-24 and accompanying text.

133. *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938)(dictum); J. ELY, *DEMOCRACY AND DISTRUST* (1980).

134. While presence of an immutable characteristic such as race, gender or national origin entitles a classification to a higher level of scrutiny, not all immutable characteristics give rise to the highest level of scrutiny, strict scrutiny. Cases of gender classification are analyzed under an intermediate level of scrutiny. *Craig v. Boren*, 429 U.S. 190 (1976).

On first blush, language is not an immutable characteristic. Individuals can learn a second language. But the importance of using immutable characteristics as identifiers for members of discrete and insular minorities is based on the fact that immutable characteristics provoke discriminatory action, or make it easy for the state in its classification to treat individuals possessing the immutable characteristic differently. In these situations, language is an immutable characteristic. Use of the Spanish language, as in Nancy Puertas' case in a Miami supermarket, provokes discriminatory action. It is an identifier for a discrete and insular minority.

Treating language as an immutable characteristic is not without some judicial precedent. In *Garcia v. Gloor*, although upholding an English-Only rule in a Texas lumber supply store, the Fifth Circuit stated that for many who speak only one language, the practical reality is that "language might well be an immutable characteristic like skin color, sex or place of birth."<sup>135</sup>

Classifications based on national origin also are considered suspect because national origin is immutable.<sup>136</sup> However, national origin clearly is not evident merely from observing an individual, while language is observable from merely hearing an individual speak. The analysis in Part II linking language to culture, and the promulgation of English-Only rules in the historical context of exploding Hispanic immigration,<sup>137</sup> argues strongly for treating language as a proxy for national origin. The English-Only movement is not only about English. It is about culture, and about cultures that originate in particular nations.<sup>138</sup>

Once English Only is considered a suspect classification, thus qualifying for analysis under the strict scrutiny standard, the question becomes whether there is a compelling state purpose behind the classification, and, if so, if the means are narrowly tailored to meet this purpose. The ends analysis focuses mainly on whether there are discriminatory motives on the part of those who promulgated the English-Only provisions.

In the case of Proposition 63, opponents probably could show discriminatory intent on the part of U.S. English officials, particularly by pointing to the 1986 John Tanton memos mentioned in Part I.<sup>139</sup> However, since Proposition 63 became part of the Cali-

---

135. *Garcia*, 618 F.2d at 270. The court in *Garcia*, however, held that because the plaintiff was able to speak English, the English-Only rule did not discriminate unfairly against him. *Garcia*, 618 F.2d at 269-70. *Garcia*, although ultimately decided on Title VII grounds as in *Gutierrez*, did not preclude using language as a proxy for national origin. It simply concluded that in this case "the English-only rule was not applied to *Garcia* by *Gloor* either to this end or with this result." *Garcia*, 618 F.2d at 268.

136. See Note, *supra* note 24, at 1353-54.

137. See *supra* note 7 and accompanying text.

138. See *supra* notes 63-69 and accompanying text.

139. See *supra* note 40 and accompanying text.

ifornia Constitution through the referendum process, earning the support of nearly three-quarters of the state's voters, it seems unlikely that discriminatory intent on Tanton's part will be enough to show discriminatory intent on the part of all of the California voters who voted for the proposition. In fact, shortly before the election, *Los Angeles Times* polls showed that a majority of Hispanic voters were actually in favor of the proposition.<sup>140</sup>

The major shortcoming of equal protection jurisprudence's discriminatory intent doctrine is that it focuses too much on the motives of those doing the classifying and too little on the injured party. Professor Charles Lawrence has suggested an alternative test for determining whether classifications unfairly discriminate.<sup>141</sup> According to Lawrence,

intent is a notion that does not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision-maker's beliefs, desires, and wishes.<sup>142</sup>

Lawrence argues that discriminatory intent is largely unconscious, and that in the United States, "a common historical and cultural heritage" has made racism a way of life.<sup>143</sup> Thus, Lawrence would abandon discriminatory intent in favor of a "cultural meaning" test that "posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning. . . . This test would thus evaluate governmental conduct to determine

140. See *supra* note 122. Proposition 63 opponents attributed Hispanic support for the measure to the misleading presentation of its effects by Proposition 63 supporters. Opponents claimed that Hispanics supported the measure because they do not contest the notion that English is the main language in the United States. Opponents also contend, however, that Hispanic supporters of the measure did not see Proposition 63 as limiting bilingual services and actual use of the Spanish language. Trombley, *supra* note 122.

141. Professor Owen Fiss also has proposed an alteration of equal protection analysis that would be beneficial to English-Only opponents. See Fiss, *supra* note 41. Fiss, however, would abandon the entire antidiscrimination mediating principle in the equal protection clause in favor of the group disadvantaging principle. Fiss' mediating principle would recognize that individuals often are treated not as individuals but as members of a group because of some characteristic that identifies them with that group." "Members of the group identify themselves—explain who they are—by reference to their membership in the group; and their well-being or status is in part determined by the well-being of the group." *Id.* at 148. Fiss' theory is compatible with those advanced by Karst, *supra* note 74, and Erikson, *supra* notes 71-73 and accompanying text. Applied to English-Only provisions, the group disadvantaging principle would recognize that the equal protection clause must protect language minorities from a provision that lowers the status of their group.

142. Lawrence, *supra* note 37, at 322.

143. "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.[ ] Because of this shared experience, we also inevitably share many ideas, attitudes and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites." *Id.*

whether it conveys a symbolic message to which the culture attaches racial significance."<sup>144</sup>

Applied to English-Only measures, Professor Lawrence's cultural meaning test would require courts to determine what symbolic message is conveyed by making English the official language and whether there is a racial significance attached to that symbolic message. Parts II and III show that the symbolic message of English-Only measures is that English and Anglo culture are superior and Spanish language and culture<sup>145</sup> are inferior. Such a symbol has a great deal of racial significance.<sup>146</sup> Such a symbol sends a message of superiority to whites; a message of inferiority to Hispanics. Thus, under the cultural meaning test, English-Only provisions would be struck down as violations of the equal protection clause.

A second theory for applying equal protection analysis to English-Only provisions involves identifying a fundamental right to language.<sup>147</sup> In addition to protecting discrete and insular minorities, the equal protection clause prohibits classifications that "distribute benefits and burdens in a manner inconsistent with fundamental rights."<sup>148</sup> Fundamental rights currently recognized include the right to equal voting opportunity,<sup>149</sup> the right to equal litigation opportunity<sup>150</sup> and the right to reproduce.<sup>151</sup>

The theory behind giving strict scrutiny to these fundamental rights is that government simply should not impinge on these rights that implicate liberty or property interests or that involve matters of individual autonomy.<sup>152</sup> Part II of this paper made the case for language as a matter of individual autonomy.<sup>153</sup>

The third theory for giving constitutional protection to language choice is similar to the second but uses the right to privacy found in the First, Third, Fourth, Fifth, Ninth and Fourteenth amendments<sup>154</sup> as its constitutional hook, rather than the equal protection clause.

---

144. *Id.* at 324.

145. As well as the languages and cultures of other language minorities.

146. Professor Lawrence acknowledges that cultural meaning will be a more difficult test for courts to apply than the current discriminatory intent test. He points out, however, that construction of text is a basic judicial task. Lawrence, *supra* note 37, at 358-59. Lawrence points out that ease of judicial administration is not his primary concern and should not be that of the court. "I argue that the chief virtue of the cultural meaning test lies not in its ease of application but in its ability to focus our attention on the correct question: Have societal attitudes about race influenced the governmental actor's decisions?" *Id.* at 328.

147. Piatt, *supra* note 54, at 885.

148. L. TRIBE, *supra* note 26, at 1454.

149. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

150. Griffin v. Illinois, 351 U.S. 12 (1956).

151. Skinner v. Oklahoma, 316 U.S. 535 (1942).

152. L. TRIBE, *supra* note 26, at 1454, 1458.

153. See *supra* notes 51-97 and accompanying text.

154. Griswold, 381 U.S. at 484-85.

Like the analysis for applying equal protection suspect classification analysis to English-Only provisions, analysis for applying right to privacy analysis to English-Only provisions involves re-thinking current jurisprudence in the area of the right to privacy as protecting an individual's right to self-definition.

Current right to privacy jurisprudence, quite frankly, is a mess. Beginning with *Griswold*, the Supreme Court seemed to be describing the right to privacy as a protection from disclosure of private matters.<sup>155</sup> In *Roe v. Wade*,<sup>156</sup> however, the Court seemed to be extending the concept to encompass a zone of individual autonomy into which the state could not intrude. In subsequent cases including *Carey v. Population Services Int'l*,<sup>157</sup> *Eisenstadt v. Baird*,<sup>158</sup> and *Bowers v. Hardwick*,<sup>159</sup> the Court retreated from this individual autonomy, self-definition approach in favor of categorically defining zones of privacy.<sup>160</sup>

In their dissent in *Bowers*, however, justices Blackmun, Brennan, Marshall and Stevens stated that Michael Hardwick's claim must be analyzed in "light of the values that underlie the constitutional right to privacy," which include giving individuals freedom to make choices about the most intimate aspect of their lives.<sup>161</sup>

If the Court were to return to its self-definition, autonomy right to privacy analysis, Part II provides strong reason for extending the right to privacy to language choice. Language is an important aspect of self-definition. Thus, the right to privacy, as understood here, would protect individual autonomy expressed through language choice against state imposition of an official language.<sup>162</sup>

## CONCLUSION

Several constitutional law scholars, sociologists and members

---

155. E. BARRET & W. COHEN, CONSTITUTIONAL LAW: CASES AND MATERIALS 584 (7th ed. 1986).

156. 410 U.S. 113 (1973).

157. 431 U.S. 678 (1977).

158. 405 U.S. 438 (1972).

159. 478 U.S. 186 (1986).

160. Part of the Supreme Court's problem in the right to privacy area is, undoubtedly, the political and social controversy that surround abortion and homosexuality, two of the issues that have figured prominently in right to privacy cases. In both of these cases, the Court seems to have lost its focus on the concept of individual autonomy in the wake of dealing with these complex social and political problems.

161. *Bowers*, 478 U.S. at 199-200 (Blackmun, J., dissenting).

162. Right to privacy analysis here is undoubtedly severely truncated. Some of the problems not addressed here are whether protection of language choice through the right to privacy would apply to both the public and private sphere. I would suggest, however, that delegitimization of language choice in the public sphere, while not eliminating it in the private sphere, would make an individual define himself one way in one realm and a different way in another.

of oppressed groups have argued that current legal descriptions of and remedies for racial and ethnic discrimination are inadequate.<sup>163</sup> This article concurs with those commentators' judgments applied specifically to state laws and constitutional provisions that make English the official language.

In a societal context where English means white means Anglo culture, making English the "official language" makes white the official race and Anglo culture the official culture. Hispanics experience such language, race and culture hierarchies as badges of inferiority no different from segregated schools or segregated train cars. When the law of the land, or of the state, relegates one of the tools for their self-definition to an inferior position, they feel incomplete. The evidence for this injury is everywhere. It is in the experience of Hispanics throughout the country. The courts must hear their voices—the voices of Luis, of the Hispanic Stanford undergraduates and of the 19.4 million Hispanics in this nation. Courts have the tools to hear these voices in the equal protection clause of the 14th amendment and in the right to privacy, properly understood as a protection of an individual's right to self-definition.

*Other than enchiladas, I guess the thing that I cherish most in my relationship with my grandfather is the cards he sends me on my birthday or Valentine's Day or just because. The most precious part of his communication is the words he uses to close his short messages—always typed now, since the stroke. "Con amor siempre." They are not his words, they are his voice, they are him. And I would like to find that voice of his that is a part of me.*

---

163. See, e.g., Lawrence, *supra* note 37; Fiss, *supra* note 41; D. BELL, AND WE ARE NOT SAVED (1987); Bell, *Is Brown Obsolete? Yes!*, INTEGRATED EDUCATION, May-June 1976, at 28; Lawrence, "Justice" or "Just Us": Racism and the Role of Ideology, 35 STAN. L. REV. 831 (1983).