

# FREEDOM TO SPEAK ONE LANGUAGE: FREE SPEECH AND THE ENGLISH LANGUAGE AMENDMENT

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Language is a controversial issue in contemporary American society. Proposals for declaring English the official language of the United States have gained momentum at state and national levels. Since 1984 nine state legislatures have declared English their states' official language.<sup>1</sup> In five states, voters have approved amendments to state constitutions designating English as the official language.<sup>2</sup> These developments at local levels parallel attempts to declare English the national language through an amendment to the United States Constitution.<sup>3</sup>

Representatives of linguistic minority groups have expressed strong opposition to the enactment of these laws.<sup>4</sup> Bitter debates have raged over the legality and necessity of declaring English the official language at state and national levels.<sup>5</sup> Opponents argue that

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1. See ARK. STAT. ANN. § 1-4-117 (1987); MISS. CODE ANN. § xx (1987); N.C. GEN. STAT. § 145-12 (1987); 19XX N.D. Laws XXX; S.C. CODE ANN. § XX (Law. Co-op. 1987); 1986 Ga. Laws 70; TENN. CODE ANN. § 4-1-404 (1985); IND. CODE ANN. 1-2-10-1 (Burns 1986); VA. CODE ANN. § 22.1-212.1 (1985); and KY. REV. STAT. ANN. § 2.013 (Miche/Bobbs-Merrill 1985).

Nebraska declared English its official language in 1920. See NEB. CONST. art. I, § 27. In 1923, Illinois adopted "American" as its official language, but changed the designation to "English" in 1969. See ILL. STAT. ANN. ch.I, para. 3005 (Smith-Hurd 1985). Hawaii established English as its official language in 1978. See HAW. REV. STAT. § 1-13 (19XX).

2. See ARIZ. CONST. art. 28; CAL. CONST. art., III § 6; COLO. CONST. art. 2, § 30(a); and FLA. CONST. art. 2, § 9. Alabama voters approved a constitutional amendment making English the official language of the state on June 5, 1990. See "A Common Language Benefits Our Nation And All Its People," a brochure prepared by U.S. English, 818 Connecticut Avenue, N.W., Suite 200, Washington, D.C. 20006, an organization which coordinates efforts to declare English the official language at state and national levels.

3. Five pieces of Official English legislation were introduced in the United States Congress during the 101st session. House Joint Resolutions 81, 79, 48, and 23 proposed a constitutional amendment declaring English the official language of the United States. House Resolution 4424, the "Language of Government Law," called for designating English the government's official language by statute. Congress adjourned without taking any action on these proposals. See "Facts On Official English," a July 1990 fact sheet prepared by U.S. English, *supra* note 2.

4. Lindsey, "Debates Growing on Use of English," New York Times, Jul. 21, 1986, at 1, col.3.

5. *Id.* See also "Who's Who In The Language Movement," a February 1989 U.S.

declaring English the official language will endanger bilingual education programs,<sup>6</sup> deny access to the electoral process,<sup>7</sup> and engender discrimination against those who speak languages other than English. On the other hand, proponents of English supremacy contend declaring English the official language at state and federal levels will facilitate the participation of migrants in American society,<sup>8</sup> preserve the national unity required for political stability,<sup>9</sup> and affirm the importance of English in contemporary American society.<sup>10</sup>

This article examines the incompatibility of the English Language Amendment (ELA), a proposal to declare English the official language of the United States, with freedom of speech as embodied in current First Amendment law. Part I reviews the historical trajectory of the language issue and explores recent developments encouraging the growth of support for ELA. Part II discusses how such an amendment will curtail the rights of linguistic minorities in this country and examines a recent decision holding an Arizona constitutional amendment declaring English the official state language violated the First Amendment. Part III concludes the policy arguments proponents of official English use to advance their cause are not only groundless, but engender the discrimination, strife, and alienation they claim they seek to prevent.

## I. THE ISSUE OF LANGUAGE

The desire to protect the supremacy of the English language in this nation dates back to colonial times. In 1755, Benjamin Franklin expressed concern that German immigrants would retain German customs and language, and thus Germanize the British

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English fact sheet. U.S. English identifies its opposition, the English Plus Information Clearinghouse (EPIC), as "a coalition of groups established in 1987 under the auspices of the National Immigration Forum and the Joint National Committee for Languages. Endorser and participants in EPIC include the American Jewish Committee, the American Civil Liberties Union, Mexican American Legal Defense and Educational Fund (MALDEF), and the National Association for Bilingual Education (NABE). The coalition recognizes the primacy and importance of English to national life and rejects the objectives of 'English Only.'"

6. See Lindsey *supra* note 5.

7. See "The English Language Amendment: Hearings on S.J. Res. 167 Before the Sucomm. on the Constitution of the Senate Comm. on the Judiciary," 98th Cong., 2d sess. 81 (1984) (The right to vote is the key to all freedoms we enjoy in the United States . . . . By imposing a language barrier to the right to vote, we would deny many citizens in our Nation access to the most basic and important tool in democracy.) (statement of Baltasar Corrada del Rio, former Resident Commissioner of Puerto Rico) [hereinafter cited as "Hearing"].

8. See "The English Language Amendment," a publication of U.S. English *supra* note 2.

9. *Id.*

10. *Id.*

colonies.<sup>11</sup> In 1780, however, the Framers of the Constitution chose not to establish a national language, and rejected John Adams' proposal for an American Academy to promote the uniform use of English in the United States.<sup>12</sup> The Framers thought the proposal was inconsistent with the cultural composition of the new nation.<sup>13</sup> Nonetheless, English emerged as the language of government and social interaction.<sup>14</sup>

Linguistic chauvinism in the United States increased with the purchase and conquest of territories from France, Mexico and Spain during the 19th century.<sup>15</sup> Federal authorities were concerned the use of languages other than English threatened national unity.<sup>16</sup> For example, Louisiana was granted statehood only after its constitution specified that all state laws, official documents, and judicial and legislative materials had to be recorded in English.<sup>17</sup> The federal government also insisted that efforts of missionaries to "civilize" Native Americans include education in English.<sup>18</sup>

Residents of Spanish-speaking territories encountered the same pressures imposed on the French and Native American populations of the new territories. The California Constitution of 1849 called for the publication of all laws, decrees and regulations in both English and Spanish.<sup>19</sup> This initial respect for Spanish-speakers was short-lived. Subsequent legislation required the use of English in the classroom, and conditioned the right to vote on the ability to

11. Franklin wrote:

[Why] would the Palatine [German] boors be suffered to swarm into our settlements, and, by herding together, establish their language and manners, to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of aliens, who will shortly be so numerous as to Germanize us, instead of our Anglifying them?

B. FRANKLIN, OBSERVATIONS ON THE INCREASE IN MANKIND (1755), *quoted in* GRANT, THE FOUNDERS OF THE REPUBLIC ON IMMIGRATION, NATURALIZATION, AND ALIENS 11 (1928).

In his book Grant compiled the xenophobic statements of the "Founding Fathers" in an attempt to legitimize opposition to immigration early in this century. See STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 11 (1981).

In the 1980's xenophobic voices still spoke in this country. Supporters of ELA contend leaders of ethnic blocs, mostly Hispanic, reject the melting-pot concept, resist assimilation as a betrayal of their ancestral culture, and demand government funding to maintain their ethnic institutions. See Wright, "U.S. English," *San Francisco Chronicle/Examiner*, Mar. 20, 1983.

12. Wagner, "America's Non-English Heritage," 19 *SOCIETY* 37, 38 (1981).

13. Francis, "The Constitutional Future of the All-English Ballot," 16 *PAC. L.J.* 1929, 1036-37 (1985).

14. See Wagner *supra* note 12, at 37.

15. McFadden, "Bilingual Education and the Law," 12 *J. L. & EDUC.* 1, 6-7 (1983).

16. See Wagner *supra* note 12, at 38.

17. *Id.* at 39.

18. *Id.* at 38.

19. See McFadden *supra* note 15, at 6-7.

read and write English.<sup>20</sup>

In Puerto Rico, the United States launched an unsuccessful campaign to impose the English language on Puerto Ricans.<sup>21</sup> The campaign included a ban on the use of Spanish in the classroom.<sup>22</sup> The resistance of Puerto Ricans to the imposition of English forced the United States and the local government to reinstate Spanish as the medium of education in 1949.<sup>23</sup>

Cultural conflicts, including the dispute over language, increased in American politics at the end of the nineteenth-century.<sup>24</sup> Immigrants from southern and eastern Europe crowded into urban ethnic neighborhoods and retained the language and traditions of their homelands. Observers questioned the ability of these immigrants to assimilate into American society.<sup>25</sup> During this period the "melting pot" metaphor became a cloak for attempts to force immigrants to accept dominant Anglo-Saxon cultural values and attitudes.<sup>26</sup>

The public and private sectors cooperated to coerce the Americanization of immigrants.<sup>27</sup> This campaign consisted of pressuring immigrants to acquire American citizenship, and to abandon their native tongues. It tried to suppress anti-American sympathies and was intolerant of values contrary to predominant American beliefs.<sup>28</sup> The penalty for failure to comply with these demands included higher property taxes, denial of employment and social

20. *Id.* at 7.

21. *Id.* See also Leibowitz, "Imposition of English as Language of Instruction on Puerto Rican Schools," 10 REV. DER. PUERT. 175, 225 (1970). Leibowitz explains: [t]he rise of the militant Puerto Rican Nationalist Party and the strong advocacy in Puerto Rico of independence converted the question of whether Puerto Rico would accept the imposition of English as the language of instruction to one of sovereign prerogative.

For a detailed analysis of the Puerto Rican situation, see GARCIA MARTINEZ, *IDIOMA Y POLITICA* (1976). Garcia Martinez, a former law professor and magistrate, places the issue of language in Puerto Rico within a legal, political and historical context.

22. See McFadden *supra* note 15, at 42.

23. *Id.* at 40. The language issue has resurfaced in Puerto Rico with U.S. efforts to organize a plebiscite on the Island. The referendum would allow Puerto Ricans to decide whether they want to become a state, remain a Commonwealth, or attain independence. The U.S. has not made clear, however, whether Puerto Ricans would have to become English-speaking in the event they decide on statehood. Supporters of English supremacy have made clear their opposition to a non-English speaking state. See "Is U.S. Leading Puerto Rico Down Primrose Path?," ENGLISH FIRST MEMBERS' REPORT, vol. V, No. 3, Fall 1990, 1-2.

English First, 8001 Forbes Place, Suite 102, Springfield, Virginia 22151, is another organization advocating for English as the official language at state and national levels.

24. See Wagner *supra* note 12, at 42.

25. *Id.*

26. Karst, "Paths to Belonging : The Constitution and Cultural Identity," 64 N.C.L. REV. 303, 312 (1986).

27. *Id.*

28. *Id.* at 313.

services, and even deportation.<sup>29</sup>

Political leaders sympathized with the growth of nationalist and nativist emotions. In 1906, Congress established a requirements that immigrants must speak English in order to receive United States citizenship.<sup>30</sup> Local governments eliminated the use of German in public schools, and even restricted German language instruction in parochial schools.<sup>31</sup> As a result of these actions, the number of students studying German dropped from about 324,000 in 1915 to less than 14,000 in 1922.<sup>32</sup>

Patriotic hysteria and suspicion of foreigners expanded with the First World War and the triumph of the Bolshevik Revolution.<sup>33</sup> Organizations labeled "patriotic societies" engaged in nationalistic agitation campaigns calling for restrictions on immigration and the immediate assimilation of migrant groups.<sup>34</sup> These developments stimulated legislation in 1921 and 1924 to restrict the entrance of immigrants into the country.<sup>35</sup> These laws created stringent quotas that reduced the total number of people entering the country, but favored immigration from the British Isles and Northwestern Europe.<sup>36</sup>

A reduced immigrant flow defused the anti-foreigner frenzy

29. *Id.* at 313-314.

30. The Act of June 29, 1906 provided:

No alien shall hereinafter be naturalized or admitted as a citizen of the United States who cannot speak the English language.

*See* The Act of June 29, 1906, Pub. L. No. 338, § 8, 34 Stat. 596, 599 (1906).

31. *See* Wagner *supra* note 12, at 40.

32. *Id.* at 41.

33. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 254 (1955).

34. *Id.* at 255.

35. First Quota Act of May 19, 1921, for example, provided in part that:

[T]he number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per cent of the number of foreign-born person of such nationality resident in the United States as determined by the United States Census of 1910.

*See* Pub. L. No. 5, 42 Stat. 5 § 2(a) (1921).

Similarly, the Immigration Act of 1924 established:

The annual quota of any nationality shall be 2 per cent of the number of foreign born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100.

*See* Pub. L. No. 139, 43 Stat. 153, 159 § 11(a) (1924). This latter piece of legislation governed United States immigration policy until 1952.

36. "Immigration quotas as known in American immigration law have a twofold purpose: to restrict numerically the volume of immigration into the United States and to select the immigrants who may enter under the quota system in such a way as to preserve, as far as possible, the balance among the various elements in the American white population." AUERBACH, *IMMIGRATION LAWS OF THE UNITED STATES* 47 (1955).

The quotas were a reaction to increased immigration of non-Europeans. Immigration from Europe dropped from 75.3% of all newcomers to the United States between 1911 and 1920, to 59.9% of arrivals between 1921 and 1930. The quota system helped the flow of immigrants from Europe increase to 65.7% of all newcomers from 1931 to 1940. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* 664 (1975).

during the 1930's. Fear and suspicion of foreigners, however, regained momentum with the internment of thousands of Japanese-Americans in concentration camps during the Second World War. A variety of interest groups, from media to labor and farmer organizations, pressured the federal government to implement the shameful confinement.<sup>37</sup>

Increased immigration from Latin America and Asia over the past two decades has renewed a concern for the impact of immigrants in American society.<sup>38</sup> A major element of this concern is the status of English as the dominant language in the United States.<sup>39</sup> In 1981 Senator S.I. Hayakawa of California introduced in the United States Senate an amendment to the United States Constitution making English the official language of the nation.<sup>40</sup> Congress rejected the initiative and subsequent attempts to introduce

37. See TENBROEK, *PREJUDICE, WAR AND THE CONSTITUTION* (1954) for a detailed analysis of the internment process. The book collects the observations of social scientists from the University of California who studied this episode. See also CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS* (1976), for a legal history of Japanese-Americans in the United States.

38. See Lindsey *supra* note 4.

39. See Hearing *supra* note 2. "[T]he English Language Amendment is a necessary designation of one language as the common denominator for a complex and diverse society." (statement of U.S. Senator Steven D. Symms of Idaho at 46).

40. S.J. Res. 72 proposed:

Section 1. The English language shall be the official language of the United States.

Section 2. Neither the United States nor any State shall make or enforce any law which requires the use of any language other than English.

Section 3. This article shall apply to laws, ordinances, regulations, orders, programs and policies.

Section 4. No order of decree shall be issued by any court of the United States or of any State requiring that any proceedings, or matters to which this article applies be in any language other than English.

Section 5. This article shall not prohibit educational instruction in a language other than English as required as a transitional method of making students who use a language other than English.

Section 6. The Congress and the States shall have the power to enforce this article by appropriate legislation.

See 127 Cong. Rec. 7445 (1981).

Representative Robert Doman introduced a similar resolution in Congress, H.J. Res. 442, which provided

Section 1. The English language shall be the official language of the United States.

Section 2. Neither the United States nor any State shall require, by law, ordinance, regulation, order, decree, program, or policy the use in the United States of any language other than English.

Section 3. This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy requiring educational instruction in a language other than English for the purpose of making students who use a language other than English proficient in English.

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

See Hearing *supra* note 2, at 77.

similar amendments in 1983 and 1986.<sup>41</sup>

The failure of attempts to enact the English Language Amendment led to the creation in 1983 of U.S. English, a national, non-profit non-partisan organization, formed to coordinate efforts to make English the official language at state and national levels.<sup>42</sup>

U.S. English states its goal is to "defend the public interest in the growing debate on bilingualism and biculturalism."<sup>43</sup> It lobbies for the passage of, and organizes referendum drives calling for legislation declaring English the official language at state and national levels.<sup>44</sup> The organization has rapidly enlisted support in its efforts to impose its linguistic preference on American society. Its membership has multiplied from 200,000 to 400,000 over the past four years.<sup>45</sup>

## II. LEGAL ANALYSIS

In the United States there is no clearly defined right to speak a particular language.<sup>46</sup> The Constitution and the Bill of Rights are silent on the existence of such a right. They do not designate an official language or limit constitutional protections to speech communicated only in English.<sup>47</sup> Indeed, Congress has recognized the needs of non-English speakers and enacted statutes recognizing language rights in the areas of education,<sup>48</sup> access to court interpret-

41. In 1983 Senator Walter Huddleston of Kentucky presented S.J. Res. 167, a simplified version of the original ELA, to the Senate:

Section 1. The English language shall be the official language of the United States.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation. At the same time, Congress considered H.J. Res. 169, a resolution identical to H.J. Res. 442 of 1981. *See supra* note 40.

In 1986 legislators considered S.J. Res. 20 and H.J. Res. 96, two proposals identical to the English as official language legislation submitted in 1983. *See* "The English Language Amendment" *supra* note 3. Senator Steven Symms again raised the issue during the 100th Congress with S.J. Res. 13, 100th Cong., 1st Sess. (1987).

42. *See* "In Defense of Our Common Language," A U.S. English pamphlet, *supra* note 2.

43. *Id.*

44. *See* Lindsey *supra* note 4. *See also* "A Common Language Benefits Our Nation And All Its People" A U.S. English pamphlet, *supra* note 2.

45. *Compare* "Who's Who In The Language Movement" *supra* note 5, with Lindsey *supra* note 4.

46. Piatt, "Toward A Domestic Recognition of A Human Right to Language," 23 *Hous. L. Rev.* 885, 885 (1986).

47. U.S. CONST. amend. I states, in relevant part:

"Congress shall make no law . . . abridging the freedom of speech. . ."

48. The Bilingual Education Act of 1968, 20 U.S.C. § 880(b) (1986), provides in part:

In recognition of the special educational needs of the large number of children of limited English-speaking ability in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out new and imaginative ele-

ers,<sup>49</sup> and participation in the electoral process.<sup>50</sup>

This section consists of two parts. Section A discusses how English language laws, whether enacted at state or national levels, threaten the ability of citizens who speak languages other than English to exercise their freedom of speech. Section B examines *Yniguez v. Mofford*,<sup>51</sup> where the court held a state constitutional prohibition on the use of any language other than English by government officers and employees clashed with the First Amendment of the United States Constitution.<sup>52</sup>

### A. *The Effects of ELA on Speech*

It has been difficult to predict the impact English as official language laws will have on people who speak languages other than English. This difficulty has hindered the development of constitutional and legal arguments to counter the propositions of ELA supporters. The vagueness of proposed amendments have allowed people to construe them, depending on one's point of view, anywhere from harmless symbolic gestures to dangerous signs of cultural intolerance.

Recent developments show "English Only" laws provide powerful tools for those who do not tolerate people who speak languages other than English.

For example, in March, 1984, the Southeast Judicial District of the Los Angeles Municipal Court promulgated a rule which forbade employees to speak a language other than English in the court-

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mentary and secondary school programs designed to meet these special educational needs.

49. See generally 28 U.S.C. § 1827 (1985). This statute grants judicial officers full discretionary power to use interpreters when a party or a witness who may testify at trial does not speak English.

50. See 42 U.S.C. § 1973 (b)(f)(1) (1982), which concluded:

*The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial services. (emphasis added).*

51. 730 F.Supp. 309 (D.Ariz. 1990).

52. See Comment, "'Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States," 100 HARV. L. REV. 1145 (1987) for further discussion of federal statutory provisions involving language and the applicability of equal protection analysis to language minorities.

house, except when acting as translators.<sup>53</sup> The rule was amended nine months later to exclude conversations during breaks or lunchtime.<sup>54</sup> Subsequent judicial review of the rule suggested the regulation was not a business necessity, but a manifestation of intolerance among supervisors to the use of a tongue they did not understand.<sup>55</sup>

ELA enactment, as seen with the Los Angeles court personnel regulation, will produce consequences similar to those of the early twentieth century Americanization movement. The amendment will eliminate, or at least severely restrict, access to language assistance programs and social services.<sup>56</sup> Federal language provisions for court interpreters, bilingual education, legal services, multilingual ballots, and even veteran's medical facilities are likely to be abolished or severely curtailed.<sup>57</sup> ELA may also eliminate radio and television broadcasts in languages other than English,<sup>58</sup> and bilingual "911" operators.<sup>59</sup> These restrictions will make language proficiency a prerequisite for the enjoyment of fundamental legal rights.<sup>60</sup>

The symbolic statements made by passing the ELA are as important as the amendment's specific legal implications.<sup>61</sup> For ELA supporters, the amendment will send a clear message to immigrants that speaking English is essential for full participation in American

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53. See *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1036 (9th Cir. 1988), where the court upheld an injunction granted pending a legal challenge to an "English Only" regulation at the workplace. The court pointed out the plaintiff was entitled to the injunction based on her claim of racial and national origin discrimination with respect to a term or condition of employment in violation of Title VII, 42 U.S.C. § 2000e-2(a). *Id.* at 1039-40.

The Supreme Court subsequently ruled the appeal was moot and ordered the Ninth Circuit to vacate the opinion. See *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 110 S.Ct. 1736 (1989). Nonetheless, the events that provoked the law suit are an excellent preview of the conflict and tension English as official language laws are destined to produce.

54. *Id.* 1036.

55. *Id.* at 1042, n.15.

56. Combs & Trasvina, "Legal Implications of the English Language Amendment," *THE ENGLISH ONLY MOVEMENT: AN AGENDA FOR DISCRIMINATION 27* (League of United Latin American Citizens, Special Convention June, 1986).

57. Leibowitz, "The Proposed English Language Amendment: Shield or Sword," 3 *YALE L. & POL'Y REV.* 519, 547 (1985).

58. See Combs & Trasvina *supra* note 56, at 28.

"California English, the West Coast affiliate of U.S. English, has already opposed Spanish language yellow pages. On the East Coast, Florida English leaders [called for] a boycott of Philip Morris products for the 'crime' of advertising in Spanish, attack[ed] Spanish language library materials, and [criticized] bilingual hospital personnel and infant care manuals."

See also "Letters to the Editor," *San Jose Mercury News*, Dec. 30, 1985, where a reader accurately described objections to advertisements in Spanish or other languages as "the most idiotic form of racism yet."

59. See Combs & Trasvina *supra* note 56.

60. See Trasvina, "Language on the Line," *Miami News*, May 27, 1986.

61. See Leibowitz *supra* note 57, at 528.

society.<sup>62</sup> Opponents of the amendment see its enactment not only as a repudiation of the diversity associated with American society, but as the resurgence of legally-sanctioned racial and ethnic discrimination.<sup>63</sup>

### B. *ELA and the Overbreadth Doctrine*

Freedom of speech occupies a preferred position within the American constitutional scheme.<sup>64</sup> As a result, statutes designed to burden or punish speech which is not constitutionally protected will be invalidated as overbroad when they include within their scope speech entitled to First Amendment protection.<sup>65</sup> This overbreadth principle is based on fear that overbroad provisions will improperly render protected speech unlawful and thus "chill" the exercise of free speech.<sup>66</sup>

In *Yniguez v. Mofford*, the court relied on the overbreadth doctrine to hold a constitutional provision establishing English as the official state language in Arizona violated the First Amendment.<sup>67</sup> Article XXVIII, the provision in question, was added to the Arizona Constitution as the result of a U.S. English inspired voter initiative approved on November 8, 1988.<sup>68</sup> The Article provided in part that English was the official language of the State of Arizona and all its political subdivisions. The Article applied to all branches of government and to all government officials and employees during the performance of government business, that the State and its political subdivisions had to take all reasonable steps to preserve, protect and enhance the role of English as the state's official language. It further provided that the state and its political subdivisions, with some limited exceptions, should act only in English, and that private citizens had standing to bring suit to enforce the Article.<sup>69</sup> Yniguez was an insurance claims manager for the State of Arizona. She often spoke Spanish with Spanish-speaking people who were asserting medical malpractice claims against the state.

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62. *Id.*

63. *Id.* at 547.

64. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). *See also* *Follett v. McCormick*, 321 U.S. 573, 575 (1943); *Marsh v. Alabama*, 326 U.S. 501, 509 (1945).

65. NOWAK, ROTUNDA & YOUNG, *CONSTITUTIONAL LAW* 722 (1978).

66. NIMMER, *ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 4.11[A], at 148-149 (1984).

67. 730 F.Supp. 309, 316 (D.Ariz. 1990).

68. U.S. English, "A Common Language Benefits Our Nation And All Its People," *supra* note 2.

69. 730 F.Supp. at 310. The exceptions to the English only requirement were (a) to assist students who were not proficient in English to the extent necessary to comply with federal law, (b) to comply with other federal laws, (c) to teach students foreign languages as part of a required or voluntary educational curriculum, (d) to protect public health or safety, and (e) to protect the rights of criminal defendants or victims of crime. ARIZ. CONST. art. XXVIII, § 3(2).

She ceased speaking Spanish while performing her official duties immediately after the Article went into effect. Yniguez had signed a loyalty oath promising to obey the Arizona Constitution and feared she would be sanctioned if she continued to speak Spanish. Yniguez sued under 42 U.S.C. § 1983 to have the Article declared unconstitutional and its enforcement enjoined as violating the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 2000d, Title VI of the Civil Rights Act of 1964.<sup>70</sup>

The court concluded the article was unconstitutional as substantially overbroad in violation of the First Amendment.<sup>71</sup> The court started its analysis with the literal language of the Article. It noted the literal wording of the Article was capable of reaching speech protected under the First Amendment, such as communications between a Spanish-speaking elected official and Spanish-speaking constituents. Once the court found the Article was overbroad, it sought to define whether the overbreadth was both real and substantial in relation to legitimate legislative activity, and to determine if a narrow construction of the Article could cure its constitutional infirmities.<sup>72</sup>

The court concluded overbreadth of the Article was substantial. With few exceptions, the plain language of the Article forbade the use of languages other than English among government employees while performing their official duties. The court stressed this sweeping language created "a realistic danger of, and a substantial potential for, [its] unconstitutional application."<sup>73</sup>

In reaching its conclusion, the court did not determine whether or not the First Amendment granted Yniguez a right to speak the language of her choice. The court explained this inquiry was not needed given its finding that the language of the article was "so broad as to inhibit . . . constitutionally protected speech." Read literally, the court noted that the Article forced public employees "to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail their free speech rights."<sup>74</sup>

Finally, the court considered the vagueness of the Article in concluding its overbreadth analysis.<sup>75</sup> The court noted the parties' discrepancies in interpreting the Article and, thus, emphasized its potential for chilling First Amendment rights.<sup>76</sup> The coverage of

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70. 730 F.Supp. at 310.

71. *Id.* at 316. Given its holding on the First Amendment issue, the court did not reach the Fourteenth Amendment and 42 U.S.C. § 2000d claims.

72. *Id.* at 313.

73. *Id.* at 314.

74. *Id.*

75. *Id.* at 314.

76. *Id.* at 315.

the Article was not clear to those affected, as reflected in Yniguez's conduct. The court noted her decision to refrain from speaking Spanish arose from a legitimate concern for the perils of the Article and a desire to restrict her actions to conduct that was unquestionably safe. A law that reasonably results in such restrictions, the court concluded, is substantially overbroad.<sup>77</sup>

The court's reasoning in *Yniguez v. Mofford* is applicable to all laws that declare English an official language. Their scope is overbroad, and their boundaries are vague. As a group, these laws tell people it is unacceptable to speak languages other than English. This message gives English only supporters free reign to impose the linguistic prohibition in the forums they desire, from the electoral booth to the workplace. It also tells those who speak little or no English that speaking their language is illegal at most, unacceptable at best. They will be forced, as did Yniguez, to curtail their expression for the sake of caution. Unfortunately, when their mother tongue is their primary mode of expression, their alternatives will be limited to silence or a marginal existence grounded on inadequate communication.

Enactment of a national ELA will result in the elimination of current federal legislation that limits state language laws and protects the rights of people who speak languages other than English. An ELA will also provoke the reformation of speech protections under the First Amendment as we know them today. For example, it will eviscerate the overbreadth doctrine if vague and far-reaching language legislation is allowed to exist. Such a result will ultimately weaken and dilute current protections for free speech, independent of the language spoken.

### C. Policy Considerations

Proponents of ELA and related laws advance several arguments in support of the legislative enactment declaring English the nation's official language. The group has emphasized a concern for national unity<sup>78</sup>, the high cost of bilingual programs<sup>79</sup>, the danger that other languages pose to the supremacy of English in the United States,<sup>80</sup> and the elimination of exploitation and discrimination

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77. *Id.*

78. "Without a common tongue, the United States faces the prospect of Balkanization and linguistic separatism." See Hearing *supra* note 7, at 44 (statement of U.S. Senator Steven D. Symms of Idaho).

79. "Frequently Used Arguments Against the Legal Protection of english," a publication of U.S. English, *supra* note 2.

80. "Statistics show a disconcerting trend away from the common use of English. In 1975, the Bureau of Census reported that about 8 million people in this country used a language other than English in their households. When the census was conducted in

against non-English speakers.<sup>81</sup> These arguments fail either because they are not supported by fact, or because they do not represent substantial government interests that justify infringement of free speech.

### 1. *National Unity*

The role of language in preserving national unity is evident. Linguistic differences play a central role in continued social unrest in numerous nations.<sup>82</sup> Proponents of ELA argue that the linguistic cohesiveness of language minority groups, Latinos in particular, represent a threat to the internal unity and stability of the United States.<sup>83</sup>

The issue of bilingualism is in reality an issue of Spanish bilingualism.<sup>84</sup> In numerical terms, the United States is the fourth-largest Spanish speaking nation in the world, following Mexico, Spain, and Colombia.<sup>85</sup> Approximately 80 percent of total enrollment in bilingual education programs are Spanish speaking children.<sup>86</sup> Furthermore, Spanish speakers are the dominant linguistic minority in 281 out of 310 jurisdictions required to provide multilingual ballots

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1980, the number, . . . , was found to be over 22 million." See Hearing, *supra* note 7, at 21 (statement of U.S. Senator Walter D. Huddleston of Kentucky).

This statement which presumes the use of languages other than English in the household threatens the use of English in connection with public and official transactions is speculative at best.

81. The ELA "would discourage discrimination and exploitation by making it clear to immigrant parents and children that learning English is indispensable for full participation in the American society and economy, and by speeding them into the mainstream, . . . , as rapidly as possible," *Id.* at 24.

82. During October of 1986 a language dispute led to the resignation of Belgium's Interior Minister Charles-Ferdinand Noghomp. The conflict involved a decision to conduct the administrative processes of a Belgian municipality in French despite the opposition of non-French speakers. The language issue is a constant source of political conflict in the nation. About 4.5 million Belgians speak French while another 5.5 million speak Dutch. See Prial, "Belgian Minister resigns in Dispute," *New York Times*, Oct. 19, 1986, p.7, col.1.

83. The ELA "would establish a national consensus that a common language is necessary to preserve the basic internal unity that is required for a stable and growing nation." See Hearings *supra*, note 7, at 23 (statement of U.S. Senator Walter D. Huddleston of Kentucky).

This fear is based, in part, on the size of the Latino community in this country. Latinos are the largest linguistic minority in the United States, numbering 13,191,300 residents in 1985. See Piatt, *supra* note 46, at 899.

84. See Nunis, "American Identities," 19 *SOC'Y* 29, 30 (1981).

85. ELIAS-OLIVARES, *SPANISH LANGUAGE USE AND PUBLIC LIFE IN THE USA* 1 (1985). The growth of the Spanish speaking population is, however, largely the product of continuing immigration rather than intergenerational language maintenance. See PENALOSA, *INTRODUCTION TO THE SOCIOLOGY OF LANGUAGE* 156 (1981).

86. Boren, "Education of Hispanics: Access and Achievement," reprinted in CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, *REPORT ON THE HISPANIC POPULATION OF THE UNITED STATES: AN OVERVIEW*, cited in Leibowitz, *supra* note 87, at 524.

under the Voting Rights Act of 1975.<sup>87</sup>

Facts do not support the national unity argument. First, the contention that a common language advances national unity assumes that Latinos are strong enough and isolated enough from mainstream American society to undermine social stability. In reality, the Latino community consists of a wide range of nationalities with diverse political, cultural, economic, and class interests.<sup>88</sup> This range of nationalities obstructs the development of a single concerted political effort among Latinos to usurp governmental power in the United States. There does not exist in the United States an underground Latino movement vowing to take control of the country.<sup>89</sup>

Second, statistics show Spanish speaking immigrants are no different from other migrant groups in adopting the English language. Language shifts among immigrant groups in this country occur over a period of three generations: parents usually maintain the mother tongue and learn English to a limited extent; the first generation born in the United States is generally bilingual; and the second American-born generation is generally monolingual.<sup>90</sup> A 1985 study evidencing this pattern concluded that 90 percent of the first American-born Latino generation is proficient in English, while more than half of the second generation speaks only English.<sup>91</sup> Acceptance of English as the predominant language contradicts ELA claims that Latinos seek linguistic or political isolation within American society.

Finally, it is overreaction to bilingualism itself that threatens national unity, not the use of other languages.<sup>92</sup> The proposed enactment of English language laws has split entire communities

87. LEIBOWITZ, *FEDERAL RECOGNITION OF THE RIGHTS OF MINORITY LANGUAGE GROUPS* 8 (1982).

88. Immigrants from Puerto Rico and Mexico are of a predominantly lower class, rural background, while Cuban immigrants tend to be from well-educated, urban, middle-class families. See A.D. Trejo, "Bicultural Americans with a Hispanic Tradition," 71 WILSON LIB. BULL. 722 (1970), cited in McFadden, *supra* note 15, at 1.

Migration patterns have changed since Trejo's article. During the 1980s, the United States received an influx of both wealthy and poor Central Americans fleeing from the war-torn region. The presence of these new nationalities has increased cultural diversity among Latinos in the U.S.

89. In the United States "there is no separatist movement; simply the fabrication of a group of zealots wishing to make a mountain out of a molehill." See Hearing *supra* note 7, at 155 (prepared statement of Arnolando S. Torres, President of the League of United Latin American citizens).

90. See PENALOSA, *supra* note 85, AT 175-76.

91. See Los Angeles Daily Journal, "The Official Tongue," Nov. 12, 1986, at 4, col. 2.

92. Gonzalez, "Why We Should Not Adopt an Official Language," INTERCULTURAL DEVELOPMENT RESEARCH NEWSLETTER, No.1 (Jan. 1987).

The explosive situation between the Tamils and the Sinhalese in Sri Lanka illustrates the divisive consequences of language imposition. The roots of the conflict date back to the imposition of Sinhalese as the official national language 30 years ago. See

along racial and ethnic lines.<sup>93</sup> Ironically, language policies which create linguistic boundaries between people do not lead to the peaceful integration of immigrants into society. Instead, they produce alienation, distancing, and political impotence.<sup>94</sup>

## 2. *Bilingual Education and Elections*

The alleged cost and inefficiency of bilingual education and of electoral programs are also favorite arguments of ELA supporters. Proponents of ELA contend bilingual education alienates immigrants<sup>95</sup>, promotes the preservation of separate cultural identities<sup>96</sup>, and impedes assimilation into mainstream American society.<sup>97</sup> Proponents of official monolingualism also argue that electoral bilingualism foments uninformed voting and stimulates ethnic voting blocks to the detriment of the democratic process.<sup>98</sup>

The efficiency of bilingual education is a disputed issue within the educational field. The majority of bilingual education programs in the nation are transitional in nature.<sup>99</sup> These programs use Spanish as a transition to English and monolingual education.<sup>100</sup> Generally students receive special language classes until they reach the level of English proficiency required to participate in the regular curriculum.<sup>101</sup>

The transitional educational programs are in part consistent with the contentions of ELA supporters. Conflict arises, however, over the appropriate length of the transitional period. Monolingualists argue that transitional programs should extend for only one year, and certainly not more than two years.<sup>102</sup> Nonetheless, bilingual education has produced tangible results. For example, amid the controversy surrounding its implementation, dropout rates in

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Schmetzer, "Sri Lanka Tamils fight for identity," *Chicago Tribune*, May 3, 1987, at 1, col.1.

93. See Combs and Trasvina, *supra* note 5612, at 30.

94. See O'BARR & O'BARR, *LANGUAGE AND POLITICS* 414 (1976).

95. "(B)ilingual education appears to have become an end in itself. . . and has served all too frequently to impede the learning of English." See Hearing, *supra* note 7, at 71 (statement of U.S. Representative Norman D. Shumway of California).

96. Bilingual education "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." See Hearing, *supra* note 7, at 8 (prepared statements of U.S. Senator Jeremiah Denton of Alabama).

97. *Id.*

98. "By failing to provide a positive incentive for voting citizens to learn English, we are denying them full participation in the political process. Instead, we are making them dependent upon a few interpreters or go-betweens for information as to how they should vote." See Hearing, *supra* note 7, at 20 (statements of U.S. Senator Walter D. Huddleston of Kentucky).

99. McFadden, *supra* note 15, at 3.

100. PENALOSA, *supra* note 90, at 113.

101. *Id.*

102. 171 "A coherent U.S. English Position on Bilingual education," U.S. English, *supra* note 2.

New York City bilingual schools are much lower than rates in other schools.<sup>103</sup> Moreover, the growth of bilingual education has permitted immigrants to move up within society.<sup>104</sup>

Also under attack by ELA supporters is the use of bilingual electoral materials. Political participation by different racial, ethnic and linguistic groups is a permanent fixture within the politics of a heterogeneous society.<sup>105</sup> Voting along racial and ethnic lines is a common phenomenon in the history of the United States.<sup>106</sup> Access to the American political process through bilingual ballots helps Americanize immigrants by creating a sense of belonging in this society.<sup>107</sup> In addition, there is no reason to believe that those citizens who lack adequate knowledge of English cannot receive adequate political information from publications and mass media broadcasts in their native languages.<sup>108</sup>

The purpose of bilingual educational and electoral programs is not to increase the separation of linguistic minority groups, but rather to increase their participation in this country. These programs are designed to assert the worth of peoples and cultures which represent a significant portion of contemporary American society.<sup>109</sup> Government attention to these demands will enhance national unity and facilitate the assimilation process by increasing linguistic minority participation in different social processes. Proponents of ELA should not misconstrue the purpose of bilingual programs to argue for the enactment of English language laws.

### 3. *English Supremacy and Discrimination*

ELA proponents argue that bilingual programs, record high immigration levels, the availability of foreign language media, and the rejection of the "melting pot" ideal by recent immigrants threaten the supremacy of English within American society.<sup>110</sup> This argument is not supported by facts. English is the predomi-

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103. See "Hearings Before the Senate Comm. on Equal Educational Opportunity," 92 Cong., 2d Sess., pt. 8, at 3785 (1970).

104. PENALOSA *supra* note 85, at 141.

105. Karst, *supra* note 26, at 328.

106. The Irish and Jewish communities represent two vivid examples of ethnic politics in the United States. Irish-Americans emerged as a political force in American big city politics in the late nineteenth and early twentieth centuries. American Jews have participated in socialist and liberal politics in the nation, shifting toward more liberal tendencies with increased social mobility. See SOWELL, *ETHNIC AMERICA: A HISTORY* 30, 95-96 (1981).

107. Karst, *supra* note 26, at 328.

108. Gerda Bikales, former Executive Director of U.S. English, estimated that there are over 300 Spanish language television stations, and over 200 radio stations broadcasting in Spanish, U.S.A. Today, Apr. 10, 1985, at 8A.

109. See Karst, *supra* note 26, at 355.

110. "In Defense of Our Common Language," a publication of U.S. English, *supra* note 2.

nant language in this society.<sup>111</sup> Immigrants recognize the social and economic pressures that require command of the English language to succeed in this country.<sup>112</sup> For example, recent U.S. Census data revealed that approximately 77.7 percent of Latino households in the ten cities with the largest Latino communities speak only English at home,<sup>113</sup> suggesting that Spanish is not a grave threat to the supremacy of English in this country.

In a questionable turn of logic, proponents of ELA claim non-English speakers are the ultimate beneficiaries of English language laws. They state that one must have a command of English to reap the political, economic, and social benefits available in this country.<sup>114</sup> Proponents of ELA contend that enactment of the amendment will eradicate linguistic differences which currently motivate discriminatory practices against linguistic minority groups.<sup>115</sup>

English language laws, however, tell people that it is unacceptable to speak a language other than English. This message will result in discriminatory practices, cloaked in "legality", directed at non-English speakers. The enactment of ELA and related laws has the potential of turning criminal courts into a senseless babble of voices for non-English speakers.<sup>116</sup> The laws will also disenfranchise and impose second-class citizen status upon linguistic minorities.<sup>117</sup>

## CONCLUSION

A basic function of legislatures is to facilitate the integration of a political system.<sup>118</sup> Language laws may either facilitate integra-

111. Piatt, *supra* note 46, at 898.

112. *Id.*

113. Hearing, *supra* note 7, at 154.

114. Without speaking English, one cannot become fully involved in the political process. Without speaking English, one cannot realize the economic achievements available in this country. In short, without speaking English, one cannot fully participate in American society," See Hearing, *supra* note 7, (statement of U.S. Senator Quentin N. Burdick of North Dakota at 41).

This incentive for learning English is sufficient stimulation for migrants to acquire the language. Governmental coercion through English language laws is not necessary.

115. "Frequently Used Arguments Against the Legal Protection of English," a U.S. English publication, *supra* note . The authors use an interesting approach to advance their cause. For example, they state that "racism is entirely on the other side, with those who argue for language *apartheid* in the schools, for block voting by language, etc, Our position is precisely the opposite. We invite everyone into the American mainstream, where the opportunities are. English is the key to opportunity."

In a later section, the authors write that "(t)he discrimination seems to be running the other way. In Miami, just recently, two English-speaking Americans could not get jobs cleaning offices because they didn't know Spanish, and thus could not communicate with the cleaning crew supervisors, who spoke no English."

116. See Piatt, *supra* note 46, at 906.

117. *Id.*

118. See Jewell, "Formal Institutional Studies and Language," in O'BARR & O'BARR *supra* note 94, at 421.

tion or accelerate conflict between different language groups coexisting in a single political and social environment.<sup>119</sup>

The English Language Amendment falls into the latter category. It protects the linguistic rights of a majority at the expense of the rights of different linguistic minorities. The result is a restriction on the ability of speakers with limited English speaking capacity to participate in public forums. This consequence restricts the content of expression, in direct contradiction of the First Amendment guarantee of free speech.

Supporters in favor of declaring an official language may contend that ELA enactment would modify and not conflict with First Amendment protections. This argument ignores the Founding Fathers' original intent not to declare an official language: the flexibility needed to guarantee stability in a pluralistic society, and the central role of free speech within a democratic system.<sup>120</sup>

The ELA also fails to advance any important governmental interest which may justify restricting the content of speech. Linguistic minority groups, Latinos in particular, do not pose a threat to national unity. Statistics show Latinos born and raised in the United States adopt English as their native language. This situation is no different from the pattern of other immigrant groups in the United States. The bilingual programs which ELA supporters seek to terminate facilitate the process of social and linguistic incorporation.

The ELA openly rejects the right of non-English speakers to retain their cultural identities. In doing so, the amendment shows the destructive forces of intolerance, bigotry, and ethnocentrism. There is no room in this society, much less in this legal system, for legislation based on these motives.

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119. *Id.*

120. Columnist Mike Royko once made a comment on the Iran-contra scandal which applies to the pretensions of ELA supporters. He declared that: "(w)e are now living in a society where those who are trying to uphold the Constitution are part of a hate-America crowd and those who undermine the Constitution are patriots. Why is Alice in Wonderland when we need her here?" See Royko, "This point in time, Ollie has his fans," Chicago Tribune, July 21, 1987, at 3, col.1.