COMMENT

ENGLISH FIRST LEGISLATION: POTENTIAL NATIONAL ORIGIN DISCRIMINATION†

I. INTRODUCTION

Historically, languages other than English often have been spoken in the United States by significant numbers of people. In 1940 the second most popular language used in the United States was German.[1] Italian became the most common non-English language spoken in this country by 1960.[2] By 1975, however, there were more people in the United States who spoke Spanish than people who spoke any other non-English language.[3] Then in 1980, the first of a number of "English First" laws to be adopted by many states was passed by the Illinois state legislature.[4]

In the broadest sense, immigrants contributed substantially to the economic, social and cultural development of the United States. All the "founding fathers" were descendants of families that left England and Europe and immigrated to North America. The first Blacks to come to America were forced into immigrant status against their individual and collective wills, but were immigrants nonetheless. A sea of Polish, Italian, German, and other European and Eastern European immigrants too numerous to list here supplied the labor that supported an industrial explosion and later, the war efforts of the developing United States. It is no wonder America came to be known as a "melting pot," where no single group except Native American Indians has any claim to centuries of history and presence on the land mass which became the United States.

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1. R. BRISHETTO, BILINGUAL ELECTIONS AT WORK IN THE SOUTHWEST, at 68 (1982).
2. *Id.*
3. *Id.*
4. Ill. Ann. Stat. Ch. 1, para. 3005 (Smith-Hurd 1980).

Members of the many European immigrant groups that arrived on the shores of this country generally moved from a generation of poor blue-collar workers unable to speak English, to a second generation of bilingual persons born in the United States, to a third generation of hyphenated Americans who speak English as their primary language. Most third generation Americans speak English as their first language, demonstrating signs of complete language assimilation. These same third generation Americans usually enjoy success as measured by economic and social standards common in the United States.

Latino[5] immigrants to the United States have followed the same pattern of survival and successful language assimilation that other immigrant groups have followed. However, Latinos immigrating after 1964 had the unique opportunity to take advantage of the many rights and benefits provided for all minorities in the United States as a result of the civil rights movement and the efforts of people like Dr. Martin Luther King, Jr.

The Latino population in this country has grown, in part due to the continued presence of immigrants and their descendants and the consistent influx of more Latino immigrants each year.[6] Some members of the English speaking majority have reacted to recent growth in the Latino population[7] and to the increased use of Spanish on voting ballots, in public school classrooms, and on business signs and advertisements. One reaction was the founding of the Federation for American Immigration Reform (hereinafter "FAIR") and U.S. English (hereinafter "USE") by Dr. John Taton, the leading organizer of the "English First"[8] movement.

The following pages set forth a doctrinal approach to analyzing

5. The term "Latino" is used throughout this paper to refer to the conglomerate of the many Spanish speaking and Spanish surname peoples of Mexico, Central and South America, and the Carribean, whether citizens of the United States or immigrants to the United States. At times, for purposes of discussion, Latino citizens of the United States will be distinguished from Latino immigrants to the United States. Specific references to national origin, i.e. Mexican or Nicaraguan, may be used where necessary for clarity.

6. For purposes of this paper "first generation" refers to the children born in the United States of immigrant parents. "Second generation" refers to children born in the United States of "first generation" parents.

7. The discussion in this comment is limited to examination of Spanish speaking Latinos as a language minority. Much of this analysis may be applicable to other language minorities, most notably persons of Asian and Pacific Island national origin who speak their respective native languages as their primary language, rather than English.

8. The phrase "English First" is used throughout this comment to refer to the nationwide political movement supporting the adoption of state laws or state constitutional amendments making English the official language. "English First legislation" is used as a generic reference to laws that declare English the official language and to laws that support this policy. "English First proponents" or "proponents" is used to refer to the founding leaders of the English First movement, most notably Dr. John Tanton and Senator Hayakawa, but does not included all local persons nationwide who were and are still being persuaded to follow the "proponents" of the English First movement.

"English First" legislation. Historical background information of the English First movement is presented: the founders of the movement, its stated purpose, the underlying beliefs and psychology of the proponents, the substantive reasons behind this movement, and the social context in which the proposed legislation has been successful. One example of the state English First legislation, an amendment to the Arizona constitution,[9] will be used for theoretical analysis. The analysis demonstrates that language discrimination is facial discrimination, deserving strict scrutiny. Further analysis demonstrates that English First legislation that is neutral on the face of its language, may still be deserving of strict scrutiny, due to the improper motive of those adopting the legislation, and the disparate impact such legislation promotes on an identifiable group.

II. A History Of The English First Movement.

No provision in the Constitution of the United States declares English or any other language the official language of this country. In fact, the large number of German and French speakers among the colonists, as well as the necessity to conduct business in a Native American dialect at the time, provided for a language tolerant population in the early days of this country.[10]

Spanish and French speakers became more prevalent among United States citizens as the country expanded westward. The French language became dominant in the territory the French settled, later acquired as a result of the Louisiana Purchase.[11] Spanish settlers and Spanish missions proliferated the use of Spanish in the Southwest and West, seized by the United States as tribute for winning the Mexican-American war. The spoils of the Mexican-American War, populated by Spanish speakers, included what is now known as California, Arizona, New Mexico, Texas, Utah, Colorado, and Nevada.[12] In both cases, as the United States captured more territory, the naturalization process did not require the residents of the expansion territories to be proficient in English.[13] It was not until the late 19th century that the ad hoc policy of language tolerance gave way to sentiments of hostility.

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9. Ariz. Const. art. XXVIII. This amendment was struck by a U.S. district court for the district of Arizona, as violative of the First Amendment. *See* Yniguez v. Mofford, Civ. 88-1854 (1990).

10. *See* Heath, *English in Our Language Heritage*, Language in the USA, 6-19 (1981).

11. Liebowitz, *English Literacy: Legal Sanction for Discrimination*, 45 Notre Dame Lawyer 7, 15 (1969) (hereinafter Liebowitz, Legal Sanction).

12. Liebowitz, *The Imposition of English as the Language of Instruction in American Schools*, Revista de Derecho Puertorriqueno 175, 19-200 (1970) (hereinafter Liebowitz, Imposition of English).

13. Liebowitz, *Legal Sanction*, *supra* note 11, at 14.

Hostility towards people not proficient in English arose largely as a reaction to the influx of European immigrants and changing immigration patterns at the turn of the 19th century.[14] The developing sentiments of hostility and non-English language intolerance were clearly exhibited in the policy of "Americanization."[15]

The mere adopting of a policy like Americanization reflected the depth of English speakers' fear of foreigners and foreign languages. That fear associated with non-English speakers, came to be associated with the physical appearance of non-English speakers. People who were physically identifiable as potential foreign language speakers suffered the same hostility as those identified as foreign language speakers. Thus, English speakers discriminated against the physical appearance or national origin of an individual, as much as they discriminated against people who spoke a foreign language as their primary language. The policy of Americanization gave express validity to the repressive efforts of English speakers, requiring English proficiency for education, employment, and voting rights.[16]

Americans who spoke English dominated politics, business, and all other sources of power in the United States. Their fear of increased use of a non-English language was a reaction to a perceived threat to the domination and power of English speaking Americans. With the exception of the German immigrant class ante-World War I, English speakers' hostilities were directed at *physically identifiable foreigners*. Immigration policy in 1924 favored European immigrants over Latino immigrants, even though substantially all European immigrants spoke their own native tongues and were unable to speak English. Thus, the acts of hostility were in part based on the national origin of those individuals who were physically identifiable.

The revised immigration laws of 1965 facilitated the increase in immigration from Latin American countries, largely due to socio-economic upheavals in those countries. Many Cubans sought new life in the United States after the Cuban Revolution of 1959.[17] The astounding growth in the numbers of non-European immigrants to

14. J. Crawford, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY AND PRACTICE, at 22 (1989).

15. Current Topics in Law and Policy, *The Proposed English Language Amendment, Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519 (1985).

16. *Id.* at 535-539.

17. D. Bennett, THE PARTY OF FEAR, FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY, at 364 (1988). Many of the Cubans arriving in the United States as a result of the Cuban Revolution may have been considered refugees. Although the 1965 immigration laws may not have specifically eased the process of immigration for Cubans, the impact of English First legislation is felt by the Cuban community, especially those Cubans that are physically identifiable.

the United States continued, throughout the turn of world events.[18] Restrictionist immigration groups like USE, English First, and FAIR were formed to address the concerns of xenophobic American English speakers.[19]

Dr. John Tanton founded FAIR in 1979. This group became the leading lobbyist for continuing reform and increasingly stringent restrictions on immigration to the United States. Dr. Tanton then became a leader of the "English First" movement, founding USE in 1983 when the directors of FAIR would not broaden their agenda to include consideration of the language issue.[20] Senator S.I. Hayakawa was a co-founder of USE. There is no doubt that Dr. Tanton's choice of the Senator was influenced by Hayakawa's introduction of legislation to Congress in 1981 to make English the official language of the United States.[21]

A. *The Stated Goals of English First Proponents.*

English First proponents base their argument in favor of such legislation upon the assumptions that follow. (1) For unknown reasons, Latino immigrants are not learning English at the same rate or with the same proficiency as prior immigrant groups have done. Therefore, a declaration of English as the official language will encourage Latinos to learn English. (2) All bilingual services, especially in the contexts of employment, voting, and education are merely disincentives to learning English. An "Official English" law would remove such crutches, thereby forcing Latinos to learn English. (3) Spanish is a competing language that threatens English. Therefore, English must be declared official before Spanish is declared official. (4) Spanish endangers the cohesive unity of the United States, giving rise to separatism and multilingual strife that has plagued other bilingual countries. Therefore, declaring English the official language would preclude any dangers to which multilingualism might give rise.[22]

Each of the four English First assumptions is faulty. The unreasoned and conclusory nature of the bases for the assumptions begs the question: what are the actual motivating factors and goals of the English First proponents? Given the history of hostility and

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18. Hardship in Southeast Asia and the Vietnam War was the moving force behind the increase in Asian immigration and asylum during this time. *See id.* at 363-64. *See also* U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 1988, table 8.

19. Bennet, *supra* note 17, at 369-372.

20. Cooper, *Immigration Reformer Stirs the Melting Pot*, Nat'l J., at 1210 (May 17, 1986). *See also* Crawford, *U.S. English — Agendas Hidden Between the Lines*, Houston Chron., Oct. 30, 1988, Outlook section at 4 (hereinafter Crawford, Hidden Agendas).

21. S. Hayakawa, ONE NATION . . . INDIVISIBLE?, 12-13 (1985).

22. *See generally* S. Diamond, *Proposition 63 — English Language Initiative, A Brief History* 2 (undated); S. Hayakawa, *supra* note 21.

discrimination against foreign language speakers, the rationalization of that hostility, called "Americanization," and the restrictive nature of historic immigration policies, the actual goals of the English First proponents can be inferred: to discriminate against language minorities, who are also usually physically identifiable minorities. Therefore, English First as a movement is potentially one of the most sophisticated manners through which the proponents may mislead large numbers of citizens into passing legislation that discriminates against language minorities.

1. *Declaring English the official language will not encourage Latino immigrants to learn English: the Encouragement Theory.*[23]

According to English First proponents, one problem is that today's Latino immigrants do not learn English. They argue that the Latino immigrant population that does learn English is so slow at learning English that the rate of successful language assimilation is negligible. Proponents base the Encouragement Theory on three observations: (1) the majority of immigrants speak only Spanish; (2) the numbers of Spanish speaking immigrants has reached critical levels; and (3) these immigrants are all uneducated, most of them unskilled and poor.[24] They further argue that Latino immigrants are either unwilling or unable to learn English and cannot fathom the advantages of being English proficient in this country. However, the conclusion that declaring English the official language will encourage Latino immigrants to learn English follows from the faulty premise that immigrants need government encouragement to adopt a language other than their native tongue in order to survive economically and otherwise in what to them is a foreign country. Assuming these immigrants have the same or similar instincts for self preservation that most human beings have, such government encouragement is unnecessary. Thus, such laws would not encourage Latinos to learn English, but could serve as a means for discriminating against Latinos.

Significantly, the Encouragement Theory disregards the historical fact that millions of immigrants learned English without the need for legislation establishing English as the "official" language.

23. What follows is a discussion of each of the four assumptions previously outlined. For the sake of discussion, I have labeled each assumption and its supportive arguments as a theory. Thus, the discussion immediately following makes reference to the "Encouragement Theory," a label adopted by this author. To this author's knowledge this label is not used by any member of English First or similar organizations.

24. *See* English First, *Immigration Bill: Burdens the Nation; Fuels Bilingual Crisis*, Members Report, Dec. 1986, at 1-2.

Included in these millions who learned English absent any legislation are millions of Latinos.

The Encouragement Theory assumes that the mere adoption of a law would encourage language acquisition in Latinos because it presumes that Latino immigrants are inherently different from any previous or existing immigrant group. *What is the difference, if any?* It is most likely related to Latinos' use of Spanish. The Spanish language is an integral part of Latinos' national origin and ancestry. Thus, potential discriminatory purposes underlying the Encouragement Theory can be inferred.

Proposed legislation that declares English the official language does not provide for programs to teach English. It does not make available funds for the teaching of English to immigrants.[25] A law that simply declares English to be the official language, in and of itself, will not encourage Latinos, citizens or immigrants to learn English.

Available statistical evidence indicates that a difference between today's Latino immigrants and previous immigrant groups is the sheer numbers of the Latinos. Another difference is that large numbers of recent Latino immigrants come from countries other than Mexico. Just as European immigrants learned English absent any official mandate, Latino immigrants continue to learn English. However, unlike the European immigrants, whose influx at one point dropped to a trickle, Latinos continue to immigrate and, thus, assure the presence of a non English speaking group.

Latino immigrants follow a classic form of three-generation language acquisition, as indicated by a 1986 study by Kevin F. McCarthy and Robert Burciaga Valdez.[26] Under this construct, the immigrants are predominantly monolingual Spanish speakers. The first generation citizens are bilingual and bicultural. Second generation citizens usually speak English as their primary language.[27] In fact, of the first generation citizens under this model "more than 90 percent are proficient in English."[28] Furthermore, "more than half [of the second generation] are monolingual English speakers."[29] The Veltman Study concludes "the data indicate very rapid move-

25. At least one state program provides mandatory English instruction, but burdens the non-English speaker with the cost. *See* Tex. Educ. Code Ann. 51. section 51.917 (Vernon 1972), (Amended May, 1989). For in-depth analysis of the Texas legislation, *see* Sandoval, *The Implementation of H.B. 638 By Universities: English-Only of No-Spanish*, 11 Latino L. Rev. — (1991).

26. McCarthy and Valdez, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA (1986) (hereinafter McCarthy/Valdez Study). *See also* Veltman, THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES (1988) (hereinafter Veltman Study).

27. McCarthy/Valdez Study, *supra* note 26, at 61, fig. 6.5.

28. *Id.*

29. *Id.*

ment to English on the part of Spanish language immigrants."[30]

The Encouragement Theory fails to account for the persistent increase in numbers of Latino immigrants. The Veltman Study emphasizes this very point. "Spanish monolingualism persists because of continued immigration, and not because Hispanics are not learning English."[31] Without continued immigration by Latinos, the prevalence of the Spanish language would rapidly decline, in accord with the three-generational language assimilation model.

Declaring English the official language is not necessary to encourage Latinos to learn English. Latinos learn English as fast as previous immigrant groups. Available factual data does not establish a causal connection between adopting an offical language law and encouraging Latinos to learn the official language.

The perceived need for an official English law may be based upon the inherent differences distinguishing Latinos from other immigrant groups and citizens. The inherent differences are the language spoken as a native tongue and the national origin of Latinos. An official language law necessarily affects persons on the basis of their national origin when it affects those persons on the basis of their status as language minorities. Thus, a law adopted to further the goal of the Encouragement Theory could serve to discriminate against language minorities.[32]

2. *An English First law destroying bilingual services, especially in the contexts of education and voting would not force Latinos to learn English: the Crutch Theory.*[33]

The Crutch Theory suggests that removing bilingual assistance programs will force Latinos to learn English. English First proponents base this theory on the faulty premise that Latino immigrants can complete language assimilation in less time without formal assistance than with formal assistance. The proponents' theory presumes that bilingual services have proven to be a disincentive to learning English. It further presumes that bilingual assistance programs are ineffective in decreasing the time of transition from Spanish to English, by suggesting a causal connection between the withdrawal of bilingual assistance programs and increased pressure placed upon Latinos to learn English. The arguments proponents

30. *Id.* at 44-45.

31. Veltman Study, *supra* note 26, at 109.

32. The analysis demonstrating the discriminatory impact of an official English law largely depends upon the actual language of the specific law at issue. Such an analysis of the Arizona constitutional amendment is provided, *infra*.

33. This author uses the term "Crutch Theory" for purposes of discussion. This author has no knowledge that any member of USE or any similar organization has ever used or adopted this term to refer to the position of English First proponents discussed in this section.

make in support of the Crutch Theory do not stand up to close scrutiny.[34]

Proponents suggest that bilingual ballots mislead immigrants into believeing that they can fully participate in the political process of the United States without learning English. However, the right to vote is limited to "all *citizens of the United States* who are otherwise qualified by law to vote . . ."[35] (emphasis added). *Citizens* have a right to an effective vote. Many *citizens* are not proficient in English, most notably large groups of first generation individuals who are citizens of the United States by birth. Therefore, *citizens* have a right to language assistance to protect the effectiveness of their vote.[36] By definition, immigrants are not citizens. As such, they do not have a right to vote or access to bilingual voting assistance; nevertheless, they learn English at an astonishing rate.[37]

Removing bilingual voting assistance programs would not affect Latino immigrants in any way, but would have an immediate impact upon existing Latino *citizens*, effectively disenfranchising them from the political process. Such disenfranchisement may violate the Voting Rights Act of 1965[38] and present common law.[39] Latino citizens would be singled out because of the language they speak, an inseparable part of their national origin. This suggests that English First laws designed to remove bilingual assistance programs are directed at *citizens* and intended to impact those *citizens* on the basis of their language minority status.

Removing bilingual education services will not force Latino immigrants to learn English.[40] Available evidence indicates that native-language instruction is one successful method of facilitating the transition from Spanish to English.[41] Many "reports indicate that the more extensive the instruction in the native language, the better students may do on English-language tests in reading, lan-

34. The vast number of areas wherein bilingual assistance programs exist today is too great to be considered within the scope of this comment. However, for purposes of analysis, bilingual programs available and related to public education and voting will be discussed. The basic analysis is applicable to any context wherein a bilingual program or service is threatened by an English First law.

35. 42 U.S.C. § 1971 (West 1981).

36. Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575, 580 (1973) ("the right to vote encompasses the right to an effective vote. [A] Spanish speaking Puerto Rican is entitled to assistance in the language he can read or understand.").

37. *See* Veltman Study, *supra* note 26.

38. 42 U.S.C. § 1973 *et. seq.*

39. *See* Kusper, *supra* note 36.

40. This author takes no position on what kind of bilingual education program is best or worst. Any reference to specific programs in this comment is not meant as an endorsement of the specific program in detail, but is used for purposes of analysis. The direct question at issue in context of this discussion is *whether such programs should exist at all, in some form.*

41. *See* Crawford, *supra* note 14, at 79.

guage arts, and math . . . ."[42] Other evidence indicates that Latino students perform worse in classrooms in which English is the only language spoken than they perform in bilingual programs.[43] Withdrawing bilingual education programs could lead to a higher Latino dropout rate which would inhibit the transition process from Spanish to English. Thus, Latinos who primarily speak Spanish would be effectively disenfranchised from the educational process, unable to learn English or other subjects.[44]

Bilingual services are not crutches, but steps that facilitate Latino participation in the democratic process and enjoyment of other societal benefits. Programs designed to teach English assist the immigrant's journey to citizenship and the citizen's struggle for success in the United States.

Latinos have continued to immigrate and have continued to learn English, despite the lack of or the availability of bilingual services in this country. Thus, Latino *immigrants* would not be substantially affected by the removal of bilingual services available to *citizens*.

Available evidence does not suggest that bilingual services have proven to be a disincentive to Latinos learning English. No evidence demonstrates a causal connection between removing bilingual services and an increase in the likelihood that Latinos would be forced to learn English. Removal of bilingual services could disenfranchise Latino citizens, inhibiting their right to full participation in the American community. Such disenfranchisement would be directly related to their language minority status. That status arises due to Latino national origin, especially those Latino *citizens* who primarily speak Spanish. Removal of bilingual voting assistance could harm only Latino citizens. Removing bilingual education services would harm many more Latino citizens than immigrants. This suggests that removing such programs is intended to impact Latino citizens.

The Crutch Theory does not establish the need to declare English the official language. The high rate of Spanish monolingualism is the result of continuous Latino immigration, not the result of a slower rate of language assimilation in Latinos. The presumption that Latino citizens are somehow inherently different from other

42. Association for Supervision and Curriculum Development, BUILDING AN INDIVISIBLE NATION: BILINGUAL EDUCATION IN CONTEXT, 21 (1987).

43. Newscenter Five Checkpoint: Bilingual Education (WCVB television broadcast, Feb. 26, 1989) (Boston Latinos in English-only classrooms have the highest dropout rate, 54%, while their counterparts in bilingual classrooms dropout at the rate of 40%, a rate far below the city average).

44. Similar arguments can be made for the removal of bilingual assistance programs in the employment context. English First proponents have not presented evidence of a causal connection between removing such programs and any increase in Latinos learning English.

United States citizens, substantially supports inferring improper and discriminatory intent on the part of English First Proponents who support the Crutch Theory.

3. *English need not be declared the official language because there is no threat of any other language being adopted as the official language: the Spanish Only Theory.*[45]

The Spanish Only Theory is essentially that English must be declared the official language before Spanish is declared the official language. This presumes there is a movement afoot to declare Spanish the official language of the United States. There is not.

There has never been a movement to declare Spanish the official language of the United States. Government business historically has been conducted only in English. All government officials who are able to speak the foreign language of their constituents, also speak fluent English. No evidence supports the assumption that a Spanish Only movement exists or the conclusion that English must be declared official to defeat the illusory movement.

The proponents' perception of a need to "win a race" arises from the fact of increasing numbers of Latinos and the coincident increase in the use of Spanish in every day life. What the proponents fear is the actual widespread use of Spanish. The growing use "threatens" to make English a minority language de facto.

The widespread use of Spanish is directly related to the growth of the Latino population. Spanish newspapers circulate more widely now than ever before. Television and radio stations broadcast in Spanish. Business advertising, billboards, and store names are publicly displayed in Spanish, in certain locations of some cities. The proponents have taken a demographic phenomenon and recast it as a political movement to declare Spanish the official language, a movement with neither spokesperson nor campaign slogan.

Proponents fear the increased use of Spanish. They manifest their fear by treating Spanish speakers differently because they speak Spanish. Native Spanish speakers must speak Spanish as a result of their national origin. Thus, legitimizing the Spanish Only Theory could deny many Latino *citizens* their rights to liberty, property, and equal protection of law, without due process. Prohibiting the use of Spanish would close hundreds of businesses. It would deny Latinos the right to speak Spanish solely because they do speak Spanish. This suggests that the Spanish Only Theory is an attempt to legitimate discrimination against language minorities.

45. The author uses the term "Spanish Only Theory" for purposes of discussion. This author has no knowledge that any member of USE or any similar organization has ever used or adopted this term to refer to the position of English First proponents discussed in this section.

4. *No dangers exist related to continued use of foreign languages in the United States: the Civil War Theory.*[46]

For English First proponents the prevalence of Spanish endangers the cohesive unity of the United States. The Civil War theory suggests that the continued use of Spanish could serve as the basis for separatism leading to the kinds of problems that have plagued other multilingual countries. The proponents fail to define the concept of "cohesive unity" in this context. Any definition offered presumes the United States was a cohesive unit before the arrival of Latino immigrants and the Spanish language.

The Civil War theory is based on the premise that the "unity" or "cohesiveness" of the United States is substantially based upon the use of the English language. This begs the question: what is the common language now, and what was it historically? The United States accepted new citizens and condoned the use of non-English languages each time it acquired more land during the westward expansion. At that time, there was no evidence that multilingualism threatened the cohesive unity of the country. The most significant unifying factor was, and still is, the system of government.

However, the system of government established the basic underpinnings which bind each of the millions of United States citizens and immigrants and the fifty states and other territories to each other and to a centralized federal government. No matter what language is spoken, it is the Constitution and the accepted government structure which creates as much "unity" in this country as any other in the world. English First proponents provide no evidence that establishes a causal connection between the use of Spanish and a real threat to American "unity."

The Civil War Theory further presumes that there is a greater likelihood that Spanish, more than any other non-English language spoken in this country, would serve as language of separatism. This theory ignores the fact that America prides itself upon its "diversity" of culture, of religion, and of language, thereby earning the title of "melting pot." Using English facilitates much of day to day life.

At the core of the Civil War Theory is the proponents' desire to prohibit the use of Spanish. By enacting such a law, a legislature would create a distinct class of persons, a language minority. The creation of such a group could serve as the basis of facial discrimination against Latinos, the identified class.

Spanish does not endanger the cohesive unity of the United

46. The author uses the term "Civil War Theory" for purposes of discussion. This author has no knowledge that any member of USE or any similar organization has ever used or adopted this term to refer to the position of English First proponents discussed in this section.

States any more than union strikes, the multi-party system of government or basic economic competition. The unique history of the United States and the total failure to declare an official language diminishes the relevance of events in other multilingual countries. Declaring English the official language of the United States will not prevent any dangers to which multilingualism might give rise, but may exacerbate what separatist and competitive ideologies already motivate societal development in this country.

B. *The Hidden Purpose of the English First Movement.*

Dr. Tanton, the founder of USE, distributed a paper that he wrote to select leaders of USE at their WITAN IV conference in 1986.[47] In that paper Dr. Tanton's fear that Latino fertility will lead to Latino domination and violence is revealed.

> Can homo contraceptivus [sic] compete with homo progentiva [sic] if borders aren't controlled? Or is advice to limit one's family simple advice to move over and let someone else with greater reproductive powers occupy the space? . . .How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with a non-Hispanic influence? . . .As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?[48]

Dr. Tanton makes similary derogatory remarks about Latinos throughout his paper. He exhibits no concern for national unity or encouraging Spanish speakers to learn English. He does indicate his concern for the protection of the status quo, majority power, and majority control of societal resources.

Dr. Tanton's concerns go beyond Latino fertility. Essentially, his concerns reveal his irrational fear that Latinos will takeover and change every facet of American life. His argument states that Latinos, largely Catholic, will destroy the separation of church and state in this country.[49] This remark presumes Catholics or Latinos or both, who happen to be holding public office, cannot objectively distinguish between personal religious faith and public political duties to constituents. Dr. Tanton further assumes that Catholics, whatever their ethnicity, seek to violate one of the constitutional

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47. James Crawford publicized Dr. Tanton's paper in the article, Crawford, Hidden Agendas, *supra* note 20. Dr. Tanton admitted authorship of the paper and resigned from USE. *Id.* Other noteworthy results of the publication include the resignation of Linda Chavez, the president of USE at that time. She called the WITAN IV paper "anti-Hispanic and anti-Catholic." Arocha, *Chavez Quits U.S.English Organization*, Wash. Post, Oct.20, 1988, at A18. Walther Cronkite also resigned from the board of directors shortly thereafter, fearing that English first laws would harm minorities. Johnson, Newsmakers, L.A. Times, Oct. 16, 1988, at 1-2.

48. The WITAN IV paper, at 1-2.

49. *Id.* at 2.

premises upon which this country was founded, namely separation of church and state. He is not concerned so much with Catholics per se, but Latino Catholics. That concern once again suggests his personal interests, the interests that shaped the policies and premises of the English First movement, are improper.

Dr. Tanton also argues that Latinos will demand societal benefits, such as higher education, even though they would not merit such benefits and would not take steps to advance themselves economically and educationally. Dr. Tanton asks "[w]hat are the differences in educability [sic] between Hispanics (with their 50% dropout rate) and Asiatics [sic] (with their excellent school records and long tradition of scholarship)?"[50] This comment presumes that the 50% dropout rate results from the difficulty Latinos experience in school due to the language barrier. It further presumes that Asians are inherently more intelligent, and therefore do well in school. Dr. Tanton's personal bias pervades these comments. This begs the question as to what extent the same personal bias pervades Dr. Tanton's involvement in English First.

Dr. Tanton's most significant fear is that the demographic shift, at least in California, will give rise to an "American apartheid" shortly after the year 2000. According to his theory Whites will become a minority due to Latino fertility. However, Latinos, disenfranchised from the political process, will remain economically subordinate to Whites.

> 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 . . . . In the California of 2030, the non-Hispanic Whites and Asians, will own the property, have the good jobs and education, speak one language and be mostly Protestant and "other." The Blacks and Hispanics will have the poor jobs, will lack education, own little property, speak another language and will be mainly Catholic.[51]

Dr. Tanton's conclusions are based on racial distinctions that he draws between Whites, Asians, Latinos and Blacks. Racial distinctions such as these are inappropriate bases for state action, as prohibited by the Constitution and as applied to the states through the Fourteenth Amendment. As the founder, Dr. Tanton's views dominate the policy and goals of the English First movement. Thus, although English First legislation may be drafted in facially neutral language, it very likely is the proponents' sophisticated covert means of facilitating discrimination against language minorities who are physically identifiable.

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50. *Id.*
51. *Id.* at 5.

III. ANALYSIS OF ENGLISH FIRST LEGISLATION.

A. *Introduction.*

English First proponents have had varying degrees of success in their lobbying efforts. At least 23 states have adopted laws requiring English to be used in documents, in order to give the documents legal effect. Of these states, many have adopted constitutional amendments declaring English the official state language, some even empowering the state legislature to enforce such provisions.[52]

The process by which an English First law is adopted should influence what level of scrutiny is used to review its language. Some of the English First laws have been adopted as a result of the traditional legislative process, with all its inherent protections. However, laws like those passed in California, Florida and Arizona were adopted as a result of the popular initiative process. Laws adopted by initiative should merit higher scrutiny than other legislation due to the absence of traditional legislative procedural protections and safeguards. In fact, "the very recognition of the fundamental way in which a voter's responsibility differs from a legislator's constitutional obligation, as well as the inevitable evidentiary obstacles to assessing electoral motivation, demands a different judicial treatment of the law produced by the electorate."[53]

The Supreme Court has never expressly recognized language

52. The analysis of the Arizona constitutional amendment, *infra*, may be applicable to other state constitutional amendments and similar English First legislation. The common factors of English First legislation usually include a declaration that English is the official language or contains language that mandates the use of English in order to give actions, documents, or expressions legal effect. The 23 states that have adopted some form of English First legislation are: Arizona (Ariz. Const. art XVIII [1988]); Arkansas (Ark. Stat. Ann. § 1-4-117 [1987]); California (Cal. Const. art. III, § 6 [1986]); Colorado (Colo. Const art II, § 30a [1990]); Florida (Fla. Const art. II, § 9 [1988]); Hawaii (Haw. Const. art. XV, § 4 [1988]); Illinois (Ill. Ann Stat. ch. 1 para. 3005 [Smith-Hurd 1980]); Indiana (Ind. Code Ann. § 1-2-10-1 [Burns 1987]); Kentucky (Ky. Rev. Stat. Ann. § 2.013 [Baldwin 1989]); Lousiana (La. Rev. Stat. Ann. § 204 [West 1968]); Minnesota (Minn. Stat. § 331a.02 [1988]); Mississippi (Miss. Code. Ann. § 3-3-31 [1987]); Nebraska (Neb. Const. art. I, § 27 [1985]); New Jersey (N.J. Stat. Ann. § 35:1-2 [West 1986]);New Mexico (N.M. Stat. Ann. § 72-16-4 [1989]); North Carolina (N.C. Gen. Stat. § 145-12 [1988]); North Dakota (N.D. Cent. Code § 54-02-13 [Supp. 1987]); Rhode Island (R.I. Sen. Laws § 17-11-12 [1988]); South Carolina (S.C. Code Ann. § 1-1-696–698 [Law Co-op. 1987]); South Dakota (S.D. Codified Laws Ann. § 12-16-2 [1989]); Tennessee (Tenn. Code Ann. § 4-1-404 [1989]); Texas (Tex. Elec. Code Ann. § 61.031 [Vernon 1986]); Virginia (Va. Code Ann. § 22.1-212.1 [1989]). The provisions listed from each state are merely exemplary. Far more laws have passed in many of the states just listed that are arguably English First laws in that they somehow restrict the use of non-English languages or specifically endorse the use of the English language.

Similar analysis might be applicable to legislation in the United States territories. *See e.g.* P.R. Stat. title 7, § 568 (1989).

53. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1562 (1990). *See* n.264, discussing potential sources of extrinsic evidence for demonstrating improper purpose in the context of legislation passed by popular vote or initiative.

minority status as a suspect or quasi-suspect class. Case law suggests such a determination is possible. However, the immediacy of the English First movement and its potential discriminatory impact makes the need for doctrinal protection urgent. Constitutional constructs do not clearly protect language minorities. For purposes of analysis, the Arizona state constitutional amendment of 1988[54] will be considered.

B. *Language Minority Discrimination as Facial Discrimination.*

The strict scrutiny test applies when a law creates a suspect class, i.e. race,[55] national origin,[56] or alienage.[57] Strict scrutiny also applies when a fundamental right is curtailed.[58] Under strict scrutiny, the challenged law or classification must be narrowly tailored to achieve a compelling government interest. There can be no less restrictive means available that would achieve the same purpose.

Improper facial classifications are subject to strict scrutiny review. In *Hunter v. Erickson* [59] the court considered an amendment to a city charter that treated racial housing matters differently from other housing matters.[60] There the court found the disparate treatment of the housing rules was not justified "simply as a public decision to move slowly into the delicate area of race relations . . . ."[61] The charter amendment was neutral on its face, but differentiated "between those groups who sought the law's protection against . . .

54. Ariz. Const. art. XXVIII, states in part: "[§ 1 (1)]The English language is the official language of the State of Arizona. [(2)]As the official language of this state, the English language is the language of the ballot, the public schools and all government functions and actions. [(3) (a)]This Article applies to: [(1)]the legislative, executive and judicial branches of government; [(ii)]all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities; [(iii)]all statutes, ordinances, rules, orders, programs, and policies; [(iv)]all government officials and employees during the performance of government business. . . . . [§ 3(c)]No governmental document shall be valid, effective or enforceable unless it is in the English language. . . .. [§ 4.]A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.'

55. *See e.g.*, Loving v. Virgina, 388 U.S. 1 (1987) (invalidating a law prohibiting whites from marrying outside their race).

56. *See e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (allowed the exclusion of Japanese-Americans from certain areas of the West Coast during the war).

57. *See e.g.*, Bernal v. Fainter, 467 U.S. 216 (1984) (strict scrutiny review necessary when alienage employed by State to determine class of people).

58. The right to speak a non-English language may be a fundamental right in context of political speech and First Amendment considerations. Such analysis is significant but beyond the scope of this work. The author limits his analysis of English First legislation to considerations of equal protection doctrine.

59. 393 U.S. 385 (1968).

60. *Id.* at 389-391. The amendment to the city charter was passed by popular referendum.

61. *Id.* at 392.

discrimination"[62] and groups who did not. "The reality is that the law's impact falls on the minority."[63] The Court concluded that the differentiation between the two types of housing rules improperly discriminated against minorities, noting that the states disadvantaging a particular group in such a case "constitutes a real, substantial, and invidious denial of the equal protection of the laws."[64]

The Court revisited the same type of facial discrimination of rules in *Washington v. Seattle School District Number 1*.[65] In that case a statewide initiative was passed that differentiated between student busing rules related to diluting segregation and all other student busing rules. The Court found "the initiative was directed solely at desegregative busing in general . . . ."[66] The Court subsequently struck the initiative because "the practical effect of Initiative 350 [was] to work a reallocation of power of the kind condemned in *Hunter*"[67]. Thus, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the . . . nature of a decision to determine the decision-making process."[68]

Facially neutral language of the Arizona legislation makes the same type of impermissible distinctions as those condemned by *Hunter* and *Washington*. It requires that English be spoken by all governmental officials and employees, in all branches of state government, including local government and municipal government. Any person who resides in Arizona or does business in Arizona is authorized to sue for enforcement of the statute. Thus, the statute treats government employees and officials who speak Spanish differently than those who speak English, even though they are all capable of speaking English. The Arizona statute further allows any person to sue for enforcement. No such broad enforcement authorization exists for any law on the Arizona books. Thus, this is a classic example of the type of differentiation of treatment and reallocation of government power that was condemned in *Hunter* and *Washington*. Therefore, the Arizona amendment could be struck under the *Hunter* analysis.[69]

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62. *Id.* at 391.
63. *Id.*
64. *Id.* at 393.
65. 485 U.S. 457 (1981).
66. *Id.* at 463.
67. *Id.* at 474.
68. *Id.* at 470.
69. The Arizona statute was struck by the Arizona district court for the Ninth Circuit, on First Amendment grounds. *See* Yniquez v. Mofford, Civ. 88-1854 (1990). The author's use of the Arizona statutory language is for illustrative purposes only, recognizing that the author's analysis could be extended to statutes worded similarly to the Arizona statute, but avoiding the First Amendment problems of the Arizona statute. English First legislation worded substantially similar to the Arizona statute should

C. *Language Discrimination Under A Facially Neutral English First Law.*

If a law is neutral on its face, the discrimination at issue must ultimately be traced to a racially discriminatory purpose.[70] Such discriminatory purpose need not be the sole factor, but only one of the factors relied upon to pass the legislation.[71] Additionally, enforcing the facially neutral law must disparately impact an acknowledged suspect class. A facially neutral law that inevitably impacts a certain group in an adverse manner supports the "strong inference that the adverse effects were desired."[72]

English First legislation usually consists of language that is facially neutral.[73] The Arizona statute is an example. Arizona declared English the official language, provided for the protection of the English language, and established the qualifications for standing to sue for enforcement.[74] Florida and California similarly declare English the official language and grant their respective state legislatures the power to adopt laws to enforce the state constitutional amendments.[75] The language adopted by these states makes no reference to the national origin, race, or alienage of non-English speakers. Nevertheless, the legislative history of the language adopted by Arizona arguably supports an inference of discriminatory legislative purpose. Furthermore, disparate impact on non-English speaking Latino citizens is inevitable. Therefore, the Arizona statute must survive a strict scrutiny review, or fail.

The Arizona statute disproportionately impacts Latino citizens more than any other class of people in Arizona. Latino citizens are impacted even more than Latino immigrants. Latinos numerically are the largest group of non-English speaking people in Arizona. Statutory language prohibiting the use of non-English languages in the political process and restricting non-English speech in whatever form, clearly infringes Latino citizens' rights.

The Arizona amendment was presented to Arizona voters

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also fall under a *Hunter* analysis. However, each statute must be analyzed on the basis of the language contained therein. Also, not all English First legislation makes the drastic reallocation of power that the Arizona law extends to any person in residence or doing business in the state. Again, the analysis must be based on the language of each particular English First law that is called into question.

70. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-20 at 1503 (1988).

71. Washington, 458 U.S. at 465.

72. Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256, 279 n.25 (1979).

73. As previously discussed, language like that of the Arizona statute arguably deserves strict scrutiny as it establishes facial discrimination by its terms. Assuming arguendo this analysis fails, the following analysis of facially neutral language is applicable the Arizona statute.

74. *See supra* note 54, *quoting* text of Arizona amendment.

75. *See* Cal. Const. art. III, § 6; Fla. Const. art II, § 9.

through the initiative process as Proposition 106 (Prop. 106).[76] Prop. 106 was financed substantially by USE and English First, two organizations based in Washington D.C. "Virtually every dollar to put the measure on the Arizona ballot came from an organization based on the East Coast."[77]

Prop. 106 was passed on the basis of improper motives. Dr. Tanton's personal views, most clearly stated in his WITAN IV paper, overwhelmingly influenced the goals and policies of English First and USE. The proponents acknowledged the veracity of the WITAN IV paper. They continue to work as leaders of USE and English First and share the bias and improper motives of Dr. Tanton. These same people lent their resources and influence to the lobbying efforts in Arizona that persuaded voters to pass Prop. 106. Therefore, Prop. 106 was passed for an improper legislative purpose.[78]

Whether the discriminatory motives of lobbyists and political organizers may be imputed as the legislative purpose of voters who pass legislation by popular initiative is not clear under available constitutional doctrine. The leading case of *Palmer v. Thompson*[79] suggests it is impermissible to infer from drafters' discriminatory motives a discriminatory legislative purpose.

In *Palmer* the Supreme Court upheld the decision of the City of Jackson (City) to close its public swimming pools, rather than operate them under an integration order. No proof was offered to establish that the City's action affected Blacks differently than Whites. The mere motivation for closing the pools, "the ideological opposition to racial integration was insufficient to establish a discriminatory purpose" and insufficient to mandate reversing the City's decision.[80] The *Palmer* Court explained that "a legislative act may [not] violate equal protection solely because of the motivations of the men who voted for it."[81] The motivations of voters could not be the basis of an inference of discriminatory purpose for the City's decision. Consequently, it did not demand strict or heightened scrutiny.

The *Palmer* analysis may be distingished from the English

76. Publicity pamphlet for Proposition 106: an initiative measure proposing an amendment to the constitution of Arizona relating to the English Language (hereinafter Prop. 106), at 25 (Oct. 1988).

77. Armando Ruiz, Arizona state representative, Argument "Against" Proposition 106, Prop 106 pamphlet, *id.* at 32.

78. It is unclear under current doctrine what standard of evidence will be necessary to prove the transfer of improper motive from leaders or organizers of a political movement to individual voters when considering legislation passed by popular vote. For a discussion of potential sources and a theory supporting a relaxed evidentiary standard in the initiative context *see* Eule, *Judicial Review of Direct Democracy, supra* n.54.

79. 403 U.S. 217 (1971).

80. *Id.* at 224.

81. *Id.*

First context. First, in that case evidence suggested that Blacks and Whites were equally affected, in the same manner, as a result of the City's decison to close the public pools. The City offered a business explanation for closing down the public pools and this explanation weighed against inferring the decision makers' improper discriminatory purpose. Finally, the nature of the right at stake, swimming in a public pool, is not a highly significant right.

In Arizona, English speakers and non-English speakers are not affected by Prop.106 in the same manner. Spanish speaking Latino citizens would be harmed by the decision to eliminate bilingual voting assistance or to prohibit speaking Spanish while conducting business. The rights to vote, to speak politically, and to receive an education are essential to full participation in this society. Moreover they are constitutionally protected rights. The nature of the rights at stake for Latino citizens in Arizona, in addition to the disparate impact of the Arizona statute between Latinos and English speaking citizens, suggests that *Palmer* is inapplicable.

Palmore v. Sidoti[82] may provide a basis for imputing the drafter's discriminatory purpose as improper legislative purpose. In *Palmore* a divorced White father sued for custody of his three year old daughter after his former White wife cohabited with, and subsequently married, a Black man. Custody was granted to the divorced father in a Florida state trial court, and affirmed by a Florida appellate court without opinion. The U.S. Supreme Court reversed,[83] holding that racial classification cannot justify removing a child from her mother by the power of the State. The Court explained, "the Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot directly *or indirectly*, give them effect"[84] (emphasis added).

The *Palmore* analysis could be extended to protect language minorities, even though that case specifically considered an acknowledged suspect classification.[85] The WITAN IV paper clearly states the improper motives of Dr. Tanton and other English First proponents. USE and English First substantially supported and engineered the successful Prop.106 campaign. Upholding the Arizona statute would directly and indirectly give effect to the private biases of proponents against language minorities. The improper purpose

82. 466 U.S. 429 (1984).

83. *Id.* at 431.

84. *Id.* at 429.

85. Palmore specifically considers the impropriety of state action enforcing a facial classification. The analysis of motivation is subsequently used to demonstrate the lack of a compelling government interest. Similar motivational analysis is applicable to the Arizona statute. However, the motivation analysis of the Arizona ststute is a prerequistite which, in addition to a showing of disparate impact, would then serve as the basis for requiring the Arizona statute to pass strict scrutiny review.

of proponents can be imputed as the legislative purpose of Prop. 106. Therefore, given an improper legislative purpose and the inevitable disparate impact of the Arizona statute, it must survive strict scrutiny review or be struck as unconstitutional.

D. *Language Minority Status Is Equivalent to National Origin Status*

The Supreme Court could acknowledge that language minority status is so integrally related to national origin that discrimination on the basis of language minority status is *ipso facto* discrimination on the basis of national origin. A similar acknowledgement has already been made with respect to discrimination on the basis of ancestry which is considered identical to descrimination on the basis of national origin.[86] If the Supreme Court were to recognize the suspect nature of language minority status legislation discriminating against language minorities would be subject to strict scrutiny analysis.[87]

Language minority status is indivisible from a person's national origin. The term "'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[88] "It means the country from which you or your forebears came."[89] The Supreme Court deferred to Congress' acknowledgement that "the terms 'national origin' and 'ancestry' [are] considered synonymous."[90] No efforts beyond these have been made by Congress or the Supreme Court to define "national origin."

The language which a person speaks is usually indigenous to the country from which that person's ancestors came. National origin and ancestry determine the native tongue a person may speak. Use of a non-English language is an expression of person's national origin or ancestry. Latinos speak Spanish because it is their native tongue. Spanish is what is spoken in their country of ancestry, the language their ancestors spoke.

Language is inherently indivisible from national origin. Most Latino citizens are physically identifiable, regardless of whether they speak Spanish or not, *regardless of whether they are citizens or not*. Discrimination against a person for being a Spanish speaker is discrimination against that person because of that person's national origin.[91] What is now needed is the explicit statement by the

86. *See* TRIBE, *supra* note 71, § 16-23 at 1544.

87. "The Supreme Court has assimilated discrimination based on specific national origin to racial or ancestral discrimination." TRIBE *supra* note 71, § 16-23 at 1544.

88. Espinoza v. Farah MFG Co., 414 U.S. 86, 88 (1973).

89. *Id.* at 89.

90. *Id.*

91. The issue of whether language minority status is a protected status under the

Supreme Court or Congress that language and language minority status are indivisible from national origin. Therefore language minority status would be the equivalent of national origin status for purposes of constitutional analysis.

E. *Language Minority Status As A Separate Suspect Classification.*

Language minority status could be declared a suspect classification in its own right. The Supreme Court in *Hernandez v. Texas* has acknowledged that "community prejudices are not static, and from time to time other differences from the community norm may define other groups that need protection."[92] The Court required "the existence of a distinct class [to be] demonstrated" and a showing "that the laws, as written *or as applied*, single out that class for different treatment not based on some reasonable classification"[93] (emphasis added) to establish a constitutional violation under the Fourteenth Amendment.[94]

Language minorities should be recognized as a suspect class under the *Hernandez* analysis. The Arizona statute as written creates a distinct class of non-English speakers. The Arizona statute need only be enforced against the distinct class of non-English speakers. Language classification is not a reasonable classification for affecting the rights of non-English speakers to "the ballot, the public schools and all government functions and actions."[95] Nor is classification as a language minority reasonable in the context of requiring "all government officials and employees during performance of government business" to use English.[96] The Arizona statute identifies non-English speakers as a class, and specifically affects that class, both as it is written and as applied, in violation of *Hernandez* and in violation of the Fourteenth Amendment.[97]

Constitution has never been decided by the Supreme Court. The connection between language and national origin is selfevident, implicit in the term "national origin," but there is no authority supporting or denying that assertion. Federal courts have thus far failed to address this issue. The available cases that review English First legislation have been decided on other grounds, not having to reach the issue of determining the connection between language minority status and national origin. *See e.g. Gutierrez v. Municipal Court South East Judicial District, County of Los Angeles*, 838 F.2d 1031 (9th Cir. 1988) (preliminary injunction lifting prohibition from speaking Spanish in the work place granted; remanded to determine sufficiency of allegations of intentional discrimination).

92. 347 U.S. 475, 478 (1954).

93. *Id.*

94. The *Hernandez* court explained that the Fourteenth Amendment is not directed solely at discrimination between Blacks and Whites, striking down the Texas jury selection process as discriminating on the basis of the national origin of Mexican Americans.

95. *See supra* note 54, § 1(2).

96. *Id.* at § 1(3)(a)(iv).

97. *See* Yniguez v. Mofford, Civ. 88-1854 (1990). Latinos like the plaintiffs Maria-

IV. CONCLUSION

Historically, the English speaking majority reacted to a growing immigrant and language minority population by allowing xenophobic fears to shape the "Americanization" policy. A detailed analysis reveals that the four stated purposes of USE and English First are based on faulty premises. Guided by the WITAN IV document and Dr. Tanton's ideology of discrimination, USE and English First lobby for legislation nationwide that creates the distinct class of the language minority. The influence of USE and English First upon the local initiative process in states nationwide suggests that the ultimate discriminatory legislative purpose can be attributed to the laws that successfully pass campaigns. The legislation that passes inevitably disparately impacts the distinct class of non-English speakers. Thus, a continuing in-depth critical analysis of the goals and purposes that the English First movement purports to endorse is needed to prevent future discrimination against language minorities.

Modern strict scrutiny doctrine can be modified to prevent discrimination on the basis of language. The Supreme Court should recognize that speaking a foreign language as a primary language is derived from national origin. Foreign language speakers are predominantly physically identifiable. The physical traits are as much derived from national origin as the primary language is so derived. Speaking the native tongue which is non-English is an indivisible characteristic of an individual, whether citizen or immigrant. Discrimination on the basis of speaking a non-English language as a primary language should be declared indistinguishable from national origin discrimination, and subject to the same legal prohibitions. Alternatively, the Court should acknowledge language minority status as a suspect classification in its own right. Thus, all language minorities can be guaranteed they will not be deprived of the equal protection of the laws.

LEO JOHNATHAN RAMOS

Kelly Yniguez and Jaime P. Gutierrez were singled out by the Arizona law because both worked for the Arizona state government and spoke Spanish while performing government business. Yniguez is an insurance claims manager for the Arizona Department of Aministration. Gutierrez is an Arizona state senator. Both sued the governor for an injunction to prevent the enforcement of the Arizona constitutional amendment on First Amendment grounds, not reaching the equal protection issues.