Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English

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DEMOGRAPHY AND DISTRUST

[Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs . . . .

John Jay, Writing in The Federalist in 1788. 1


Entry reflecting official German edition of the Articles of Confederation by the Continental Congress, Nov. 1777. 2

Toda ley, decreto, reglamento y disposicion que por su naturaleza deban publicarse, se publicaran en ingles y en Castellano.

Art. XI, Section 21, California State Constitution of 1849, in its Spanish-language version. 3

INTRODUCTION

The persistence of certain historical views of language in America obscures both past and present complexity. 4 A histori-

2. 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1088 (Worthington Chauncey Ford ed., 1907) (1777); see also 1 HEINZ KLOSS, DAS VOLKSGRUPPENRECHT IN DEN VEREINIGTEN STAATEN VON AMERIKA 78 (1940) (reprinting the Continental Congress’s entries reflecting official English, German, and French editions of the Articles of Confederation).
3. CAL. CONST. of 1849, art. XI, § 21, reprinted in THE ORIGINAL CONSTITUTION OF THE STATE OF CALIFORNIA 1849, at 12, 43 (Telefact Foundation 1965) (reproducing handwritten section of Spanish version of California’s first constitution). The author’s translation of the original Spanish text is as follows: “Every law, decree, regulation and provision that, because of its nature, should be published, shall be published in English and in Spanish.”
4. See MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 5, 7 (A.M. Sheridan Smith trans., 1972) (“[T]hus historical descriptions are necessarily ordered by the present state of knowledge, they increase with every transformation and never cease, in turn, to break with themselves . . . . [H]istory is one way in which a society recognizes and develops a mass of documentation with which it is inextricably linked.”); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION AND EXCLUSION IN AMERICAN LAW 239-40 (1990) (“Claiming to narrate history is always problematic. No one has direct access to the past. Even if we did, we could not avoid bringing to it our own concerns, assumptions, and perspectives.”); cf. id. at 198 (explaining that “[i]n efforts to recover the untold stories of women’s experiences, feminists, like scholars of black history, have discovered leaders, inventors and other contributors to public life whom traditional historians simply neglected because of their own assumptions about gender and race”). This article seeks to recover our largely untold story of American cultural pluralism and its reflection in the law, an aspect of
cal view exists—a myth of linguistic homogeneity, reflected in *The Federalist* above—that allows many people to regard English as the only truly American language. This historical view also encourages the perception that all other American languages are "foreign," despite their equal or greater residency within these shores. This same historical perspective supports the claim of the official English movement that our national unity depends on linguistic homogeneity and legal reinforcement of the already dominant role of the English language in our society. Alongside this myth lies the equally persistent myth that true "American" identity is coterminous with the contours of America's dominant culture. Our history of cultural pluralism, and our legal history reflecting that pluralism, tell a very different and far richer story of American culture and identity.\(^5\)

Several paradoxes extant at the beginning of American culture persist into the present.\(^6\) An important paradox lies in the conflict between American cultural pluralism and the American demand for conformity. As historian Michael Kammen has written,

\[A\] "dialectic of plurality and conformism lies at the core of American life, making for the originality of the social structure, and raising the most contradictory evaluations." Americans have repeatedly reaffirmed the social philosophy of individualism, even making it the basis of their political thought. Yet they have been a nation of joiners.... Nor has American respect for the abstract "individual" always guaranteed respect for particular persons.\(^7\)

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5. I use the term "America" with the following meaning. In references to the "America" after colonization but prior to 1776 and the establishment of the United States, I use "America" to mean principally the geographical region now occupied by the continental United States, which then consisted of the colonies and vast territories. After 1776, I use "America" to refer principally to the United States of America.

6. The manifest contradiction between the promise of individual equality contained in the Declaration of Independence and the jarring reality of slavery is one of these paradoxes. See generally Michael Kammen, People of Paradox 92-126 (1972) (discussing pluralism and dualism in American history).

7. Id. at 292 (footnote omitted) (quoting Raymond Aron, From France, in As Others See Us: The United States Through Foreign Eyes 59-60 (Franz M. Joseph ed., 1959)).

Two recent issues of *Time* magazine well illustrate American ambivalence about recognizing its cultural pluralism or demanding conformity to "American identity." In its Special Issue of July 11, 1988, *Time's* cover story was titled *Magnifico! Hispanic Culture Breaks out of the Barrio*. The issue contains several articles describing the contributions of Hispanic artists, actors, musicians, and dancers to American culture. Almost three years later, in the
America has always been a land of many different languages and cultures. Prior to the colonization of this continent, Native American peoples spoke approximately 1000 distinct languages. The conquest and colonization of America by Spain and England resulted in the displacement and decimation of the Native American peoples and their languages and cultures. Despite this legacy of conquest, many Native American languages are still spoken today.

July 8, 1991 issue, Time's cover asks the question "Who Are We?". This issue contains a remarkable essay by Arthur Schlesinger, Jr., titled The Cult of Ethnicity, Good and Bad. Schlesinger asked:

[What happens when people of different origins, speaking different languages and professing different religions, inhabit the same locality and live under the same political sovereignty? Ethnic and racial conflict—far more than ideological conflict—is the explosive problem of our times. On every side today ethnicity is breaking up nations.

Arthur Schlesinger, Jr., The Cult of Ethnicity, Good and Bad, Time, July 8, 1991, at 21, 21. He then offered his solution to American problems of ethnic divisiveness: the forging of a new national identity. Id. I interpret this "new national identity" as an identity based on the dominant core culture.

Schlesinger's views are both illuminating and myopic. The legal history presented in this article demonstrates that cultural pluralism and varied ethnicity, including the official recognition of languages other than English, have been a feature of our society since the birth of our nation. See discussion infra part VI. Schlesinger writes about ethnicity as though it pertains only to others, different from himself. Ethnicity means a "sense of peoplehood," and the racial, linguistic, religious, and other cultural traits that contribute to that sense. See infra notes 26-28 and accompanying text. Everyone has one. If ethnicity is a problem that threatens to break up our nation, then Schlesinger's ethnicity, too, is a part of the problem.

As long as people associate the definition of "American" with the Anglo-Saxon core culture, then members of the dominant culture can always easily label Americans with different traits as "ethnic," "foreign," "un-American," or "second-class." Another solution exists, apart from labelling non-conforming Americans members of a "cult of ethnicity." It lies in expanding the concept of "American" so that it contains the full measure of our peoples' traits.


10. See William L. Leap, American Indian Languages, in LANGUAGE IN THE USA 116, 116-44 (Charles A. Ferguson & Shirley B. Heath eds., 1981) (describing the richness and variety of Native American languages). Today, over 200 Native American languages are still spoken and studied. The Navajo tribe is the largest Native American speech community, with about 89,000 members who still speak the Navajo language. Id. at 126. The Delaware and
The European colonial powers, and immigrants arriving in the wake of colonization, introduced European languages, principally Spanish and English, into what is now the United States. Subsequent immigrations of many different peoples introduced their different languages and cultures. Eventually the United States came to be known as a land of immigrants. This nation's welcoming symbol, the Statue of Liberty, embodies a promise of liberty and equality for immigrants from diverse cultures.

In the presence of many American languages, native languages and the European languages of the various peoples who populated the colonies, the Framers gave no special designation to any American language. This neutrality was neither accident nor oversight, for the Framers were acutely aware of the various white ethnic groups populating the colonies. During the Revolutionary War, for example, the Continental Congress issued official publications in German, French, and English.

One episode is particularly revealing with respect to the Framers' recognition of American cultural pluralism. On July 4, 1776, John Hancock named a committee consisting of Thomas Jefferson, John Adams, and Benjamin Franklin to de-
sign a Great Seal for the new nation. Du Simitiere, an artist the committee consulted, also participated. On August 20, 1776, the Committee returned its proposal for the Great Seal, based principally on Du Simitiere's proposal. Horace Kallen described the proposal as follows:

They proposed that the seal should be engraved on the obverse with a shield divided into six quarterings, symbolizing the six major lands of origin of the American people—England, Scotland, Ireland, France, Germany, Holland; there should also be one escutcheon each for each of the thirteen colonies; the right hand support should be the Goddess of Liberty; the left hand, the Goddess of justice; a crest at the top should contain the eye of Providence in radiant triangle. The motto was to be: E Pluribus Unum. The proposed Seal, though ultimately not adopted, has great significance. The Framers recognized the cultural diversity of the white immigrant populations in the colonies and proposed, initially, to make that very diversity the symbol of the new nation. Furthermore, in its context, the phrase E Pluribus Unum meant, in equal measures, a union composed of ethnically different peoples. Both diversity and union were recognized in the proposed seal as consistent with each other. The American union did not mean eliminating pluribus, cultural pluralism, present at the inception of the union and present now.

One aspect of the American reaction to its cultural pluralism, therefore, has been a tolerant, expansive view of liberty that includes recognition and respect for the cultural differences of Americans. With respect to language, this tradition begins in England, where movements to standardize the Eng-


17. This committee's proposal was never accepted. The proposal was referred to a new committee on March 25, 1780 and the final version of the Great Seal was not adopted until June 20, 1782. This version, the familiar American eagle clutching an olive branch and arrows in its talons, was based on proposals by Secretary Charles Thomson and William Barton. Report on a Seal for the United States, supra note 15, at 497 (explanatory note); see 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 338-40 (Gaillard Hunt ed., 1914) (1782).

lish language failed because they were thought contrary to the spirit of English liberty. In America, the Jeffersonian view of individual liberty exemplifies this tradition. It is exemplified also by the substantial legal recognition given to languages other than English by various states during the nineteenth century.

American cultural pluralism, however, has also engendered an equal and opposite reaction: a demand for uniformity and assimilation to some vision of American identity, assumed to be homogeneous. This was the vision John Jay presented. Jay’s America belonged just to one people, descended from the same ancestors, speaking the same language, practicing the same religion, and sharing similar manners and customs. The reality, as described above, was much more complex even at the time Jay wrote in The Federalist. Yet Jay’s statement contains both truth and myth.

The truth lies in the cultural dominance, then and now, of Anglo-Saxon culture. Jay was describing the dominant culture of America, “dominant by virtue of original settlement, the pre-emption of power, or overwhelming predominance in numbers.” This dominant culture was, and remains, the culture of white, Protestant, English-speaking, Anglo-Saxon Americans. This, in the terminology of sociology, is America’s core culture. English is, without question, the dominant language of America and a key characteristic of America’s core culture.

The myth in Jay’s statement lies in its exclusion of other cultural groups from the American identity. Although America’s dominant, core culture remains substantially what it was at the time of the nation’s beginning, other peoples of different language and culture have always been present in America. The Framers recognized some of this diversity in their proposal for a Great Seal.

It is both this context of American pluralism, an America composed of one dominant culture and many other cultures,
and the theory that "we, the people" are the source of governmental legitimacy, that appear to have yielded an American preoccupation with identity.\(^{25}\) American legal history is filled with instances of the majority, members of the core culture, defining through the law who belongs, and who may belong, within the American people, and who may not. A recurring theme in American law is the attempt, particularly at times of great national stress, to define the American identity through the law using the components of ethnicity.

Ethnicity, "from the Greek word 'ethnos,' meaning 'people' or 'nation'," may be defined as a "sense of peoplehood."\(^{26}\) Various constituent aspects of ethnicity include the nation itself, race, religion, and national origin.\(^{27}\) Language, too, is one of the primary aspects of ethnicity.\(^{28}\)

Legal definitions of American identity have often involved

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25. The persistence throughout our history of insecurity and questions about "American" identity seems to be a direct result of the Framers' need to justify their revolution against the British monarchy. At the time of the Revolution, the nation's Framers, struggling to achieve legitimacy for their government and their revolution, developed a new theory of governmental legitimacy. They believed that legitimacy lay not in any monarch, nor in heredity or nobility, but in the people. KAMMEN, supra note 6, at 52-54.

Although the proposition "that all men are created equal" was self-evident, the Framers did not include all the people among those whose consent would make government legitimate. Although the Constitution acknowledged the existence of African-Americans and Native Americans, it denied members of both groups equal citizenship. See DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 15-30 (2d. ed 1980); see also Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 454 (1857) (holding that a descendant of a slave was not a state citizen under the Constitution). Indeed, the Framers knew from the beginning that slavery and the American idea of equality, as reflected in the Declaration of Independence, could not be reconciled. See BELL, supra, at 21-24; KALLEN, supra note 16, at 76. After the enactment of the Fourteenth Amendment in 1868, much of the litigation under the Equal Protection Clause has sought to narrow the distance between America's promise of equality and the reality of inequality. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

A paradox thus results from the elevation of "the people" as the source of governmental legitimacy and the simultaneous subjugation of certain groups to less-than-equal status within the polity. Which people does society include among "the people" who make government legitimate? See generally EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 237-87 (1988) (discussing the invention of the "American people" as the basis for national sovereignty).


27. Id. at 26.

the components of ethnicity. The Framers of the Constitution considered "the people" to be certain male members of the core culture, and excluded others based on their race.\textsuperscript{29} Our immigration laws have sought to define American identity by race, and later by national origin as a proxy for race. More recently, the official English movement has sought to define American identity through the law by defining our official language as English.

At times of national stress, American nativism has often come to the fore, labelling American cultures, American traits different from those of the core Anglo-Saxon culture as "foreign" or "un-American." Nativism has been defined by one leading scholar as

\textit{intense opposition to an internal minority on the grounds of its foreign (i.e., "un-American") connections}. Specific nativistic antagonsisms may, and do, vary widely in response to the changing character of minority irritants and the shifting conditions of the day; but through each separate hostility runs the connecting, energizing force of modern nationalism. While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.\textsuperscript{30}

American nativism has often taken the form of reinforcing the core culture through the law—using the law to restrict the expression of ethnic traits, including languages, different from those of the majority. This labelling and use of ethnicity has yielded some of the most regrettable incidents in American legal history, such as the controversy over the Alien and Sedition Acts and the Communist witch hunts of the McCarthy era.

Consistent with prior nativist movements, the official English movement reasserts the American demand for conformity, this time through the vessel of language. The movement has sought, unsuccessfully, a constitutional amendment to make English the official language of the United States.\textsuperscript{31} With greater success, the movement has persuaded state legislatures and voters to enact statutes and constitutional amendments making English the official language of seventeen states.\textsuperscript{32}

The movement is, however, based on a series of myths and motivations that render its legislative results constitutionally suspect. The first myth is that our national unity somehow depends solely on the English language, therefore we must pro-

\textsuperscript{29} See supra note 25.
\textsuperscript{30} \textsc{John Higham}, \textit{Strangers in the Land} 4 (2d ed. 1988).
\textsuperscript{31} See infra text accompanying notes 401-04.
\textsuperscript{32} See infra note 407.
TECT the language through constitutional amendment or legislation. A corollary of this myth is that the only language of true American identity is the English language. Another myth is that multilingual election ballots, the elimination of which constitutes a cherished goal of the movement, somehow threaten our society. A final myth is the movement's proposition that bilingual education is a new threat to our society, introduced by self-interested Hispanic leaders seeking to secure employment for bilingual teachers.

This article reviews the largely unknown legal history documenting the interaction between the dominant culture and other American cultures with respect to language. This historical context has been almost entirely absent from debates about the official English movement yet it yields significant insights into the inconsistency between the aims of the movement and principles of liberty at the core of our culture. Legal history explodes both the myth of linguistic homogeneity posited by John Jay, a view still widely held, and the myths supporting the official English movement.

Part I of the article reviews early efforts to make English the national language of England, efforts which failed because they were inconsistent with the English spirit of liberty. Part II demonstrates that the Continental Congress, during and after the Revolutionary War, issued many official publications in languages other than English. Part III of the article explores the views of some of the Framers on the linguistic and cultural diversity within the United States. Part IV describes the views

33. See The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., at 11 (statement of Sen. Denton), 15 (statement of Sen. Huddleston), 53 (statement of S.I. Hayakawa, Co-Founder, U.S. English) (1984) [hereinafter Senate Hearing]; see also William G. Milán, Comment: Undressing the English Language Amendment, 60 INT'L J. SOC. LANGUAGE 93, 95 (1986) ("[T]he greatest myth of all is that there is a necessary connection between speaking English and being an American. Equating American nationalism with the 'melting pot' is nothing more than a confusion of the concepts of unity and uniformity."); Comment, The Proposed English Language Amendment: Shield or Sword?, 3 YALE L. & POL'Y REV. 519, 530 (1985) (observing that those who support making English the official language of America "make[e] precisely the mistake of equating the obviousness of language usage with its importance to national unity").

34. See Senate Hearing, supra note 33, at 53 (statement of Hayakawa); Guy Wright, U.S. English, S.F. CHRON., Mar. 20, 1983, at B9, cited in Senate Hearing, supra note 33, at 64.

35. See Senate Hearing, supra note 33, at 54, 60-61 (statement of Hayakawa).
of the Framers and early American intellectual leaders on the issues of a national language academy and language standardization. Part V of the article presents the various appeals to early Congresses for official publications in German. These Congresses, responding to requests by German-speaking constituents, debated with sophistication whether or not to issue official publications in the German language. This legal history demonstrates that debates about our cultural pluralism and our linguistic diversity actually date back to the founding of the republic.

Part VI demonstrates that languages other than English, including German, Spanish, and French, were accepted as American languages, "official" languages of several states, at an earlier time in our history. It is only an ahistorical view that can deem them foreign on this soil. The very significant extent to which languages other than English attained legal recognition, particularly in the states, is another largely unrecognized aspect of our legal history.

Part VII examines the operation of American nativism through the law. In particular, I focus on the use of the law to enforce conformity through language restriction. Legal restrictions on the German language and the German-language press were an important part of the movement against German-Americans during World War I. The development of our immigration laws demonstrates the use of language as a proxy device to exclude persons because of their national origin. To a large degree, nativism has resulted in language restrictions in our immigration laws. This trend culminates in the English-literacy requirement for citizenship which, quite remarkably, Congress enacted virtually without debate at the height of the McCarthy era as part of the Subversive Activities Control Act of 1950. These incidents illustrate clearly the symbolic politics of language and ethnicity.

The official English movement belongs firmly within this matrix. Language, one of the primary ingredients of ethnicity, has been one of the vehicles through which the majority has sought to define what is American. The official English movement is only the latest in a long history of nativist attempts to exclude certain unpopular Americans from the definition of what is American.

Finally, Part VIII analyzes and evaluates the official English movement. This part first explores insights from political science, sociolinguistics, philosophy, and law into the political
uses and symbolism of language. Principles are drawn from these disciplines to evaluate the meaning, symbolism and constitutionality of official English laws. Language is a fundamental ethnic trait. Official English laws, therefore, take an ethnic trait of the dominant culture, the English language, and give that trait legal, governmental sanction, creating second-class citizenship for Americans who possess different (hence unofficial), but equally American traits. Official English laws violate principles of equal citizenship at the core of the equal protection clause. Furthermore, as before in our history, language is being manipulated as a proxy for national-origin discrimination. This form of discrimination has not yet been adequately recognized nor addressed as a form of unconstitutional discrimination.

I. THE ANTECEDENTS: EFFORTS TO STANDARDIZE THE ENGLISH LANGUAGE IN BRITAIN

The attitude of the English towards their language and its standardization later became the inheritance of the American colonists and the Framers of our government. Failed attempts to standardize the language of England were later repeated in America.

English became the language of England very gradually. The struggle for the status of English took place in society at large, in the government, and in the legal profession. After the Norman conquest in 1066, English began as a relatively low-status language of the common people. At this time, Norman French was the standard language of Parliament, the courts, and the upper classes. Latin was the language of legal writing and scholarship. English grew in prominence as poets, preachers and some officials began writing in English. By the end of the twelfth century, the French-speaking upper class in


39. Id. at 88-89.
40. Id. at 89.
41. Id.
England also had acquired English.\textsuperscript{42} By the end of the fourteenth century, English had become the mother tongue of Englishmen.\textsuperscript{43} Lawyers, however, resisted adopting English as the language of legal practice. It was not until the end of the eighteenth century, 400 years after English had become the mother tongue of Englishmen, that English became the language of the law.\textsuperscript{44}

After English seemed established as the language of England, a strong movement to create a standard English developed.\textsuperscript{45} Between 1712 and 1800, English scholars continuously proposed an academy to regulate speech and standardize the language.\textsuperscript{46} Scholars addressed appeals for such an academy, to be modeled after similar academies in Italy, France and Spain, to the King of England during this period. These appeals often requested the King's sponsorship for the proposed academy.\textsuperscript{47} One commentator, responding to the argument that fixing the pronunciation of the English language would require a dictator, suggested using the King's pronunciation as a standard:

\begin{quote}
We have a Monarch on the throne whose superior enunciation, and elegant pronunciation of his native tongue, have long been the pride of British ears. [If one were to] collect his manner of sounding these dubious words, and communicate them to the publick\textsuperscript{48} . . . [e]very true-born Briton would pride himself thereon.\textsuperscript{49}
\end{quote}

In this commentator's view, the ultimate source of sponsorship and authenticity of language was the King himself.

The proposed academy met much resistance. Joseph Priestley, the great English chemist, lodged a serious objection: "[A] public Academy, invested with authority to ascertain the use of words . . . [is] unsuitable to the genius of a free nation . . . ."\textsuperscript{50} One proponent of the academy expressed his view that

\begin{quote}
\begin{itemize}
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. at 90.
\item \textsuperscript{45} Id. at 91; see also Allen W. Read, Suggestions for an Academy in England in the Latter Half of the Eighteenth Century, 36 MOD. PHILOLOGY 145 (1938) (surveying the historical debate surrounding proposals to establish an academy to regulate speech in England).
\item \textsuperscript{46} See Heath & Mandeback, supra note 37, at 91; Read, supra note 45, at 145.
\item \textsuperscript{47} See Read, supra note 45, at 146-56.
\item \textsuperscript{48} I have reproduced all quotations without interposing "[sic]" where contemporary standards call for it in order to retain the original character of earlier versions of English.
\item \textsuperscript{49} Letter signed "Alphonso", 69 GENTLEMAN'S MAG. 1125, 1125-26 (Supp. 1798), quoted in Read, supra note 45, at 156.
\item \textsuperscript{50} JOSEPH PRIESTLEY, THE RUDIMENTS OF ENGLISH GRAMMAR at vii (photo. reprint 1971) (London, R. Griffiths 1761), quoted in Read, supra note
matters of language choice could not be dictated to Englishmen:

Lest you should think that I would endeavor to force Men by Law to write with Propriety and Correctness of Style, I must declare, that I mean only to force them to spell with Uniformity...; and I can not but esteem the English Language to be of such Consequence to Englishmen in general that a proper Act, for the improvement and Preservation of it, would do Honor to an English Parliament. 51

Despite the writer's suggestion for an Act of Parliament standardizing the English language, no such law was ever enacted. Without support from Parliament or a national language academy, the only standardization of English during this period resulted from the publication of Dr. Samuel Johnson's dictionary in 1755. 52 Johnson opposed the establishment of a language academy: "If an academy should be established for the cultivation of our stile, I... hope the spirit of English liberty will hinder or destroy [it]." 53 Proponents of the Academy, bitterly disappointed at England's failure to regulate the language, wrote that Englishmen should "take shame to ourselves, when we reflect that we are the only civilized nation in Europe, perhaps in the known world, who have never taken any pains about our language, but have left it to take its course wholly under the guidance of chance." 54

None of these attempts to make English the standard or official language of England succeeded, and only two minor statutes survive today. 55 Political and social factors in England during this period made the establishment of an academy impossible. 56 Professor Heath has identified two critical factors responsible for this outcome:

The first is the view that Englishmen must not be forced by law in their language choices; the second is the conviction that discerning citizens will, of their own volition, make proper decisions about language

45, at 149. Priestley later moved to America and became part of Thomas Jefferson's circle of friends and thinkers. See Daniel J. Boorstin, The Lost World of Thomas Jefferson 17 (1948).

51. George Harris, Observations Upon the English Language in a Letter to a Friend, 1722-1796, at 13-14 (London 1752), quoted in Read, supra note 45, at 145.

52. Heath & Mandebach, supra note 37, at 91.


54. An examen of Mr. Sheridan's plan for the improvement of education in this country (By a set of gentlemen associated for that purpose) (London 1784), quoted in Read, supra note 45, at 151.

55. Heath & Mandebach, supra note 37, at 93. The two surviving statutes require that crown writs and incidental papers be in English and that sailors on British ships know English. Id.

56. Read, supra note 45, at 155.
in order to do honor to their identity. . . . Rejection of a national academy underscored the view that achievement of status for the English language was not a matter for Parliamentary statutes, but rather one of individual choice for socially-minded individuals.\textsuperscript{57}

Proponents of the academy, having failed in their own country, looked to the fledgling, predominantly English-speaking United States as a promising place to establish an academy. Sir Herbert Croft, British etymologist and the author of an English dictionary, discussed a proposal for an American academy of the English language with John Adams, the American minister in London in 1788.\textsuperscript{58} Croft later wrote:

\begin{quote}
Perhaps we are, just now, not very far distant from the precise moment, for making some grand attempt, with regard to fixing the standard of our language (no language can be fixed) in America. Such an attempt would, I think, succeed, in America, for the same reasons that would make it fail in England; whither, however, it would communicate its good effects. Deservedly immortal would be that patriot, on either side of the Atlantick, who should succeed in such an attempt.\textsuperscript{59}
\end{quote}

Croft's forecast regarding the standardization of language in America was to prove wrong.

\section*{II. THE CONTINENTAL CONGRESS AND OFFICIAL MULTILINGUALISM DURING THE REVOLUTION}

Despite the popular perception that English always has been the only language of the United States, Americans have spoken many languages throughout the nation's history. Native Americans, for example, spoke approximately 1000 different languages.\textsuperscript{60} Substantial populations spoke European languages other than English: Spanish in Florida and what is now the southwestern United States; German in Pennsylvania, Maryland, Virginia, New York and Ohio; French in Louisiana; Dutch and Swedish in New York and Delaware.\textsuperscript{61} The principal European languages other than English in what is now the continental United States were German, French and Spanish.\textsuperscript{62}
In the colonies prior to the Revolutionary War, German was the most widely spoken language besides English.63

The leaders of the American Revolution were keenly aware that American populations spoke languages other than English. Indeed, before, during, and after the Revolutionary War, the leaders of the Revolution sought to promote the allegiance of these non-English speaking populations, and their understanding of the revolutionary cause, by issuing key documents in German and French. In 1774, the Continental Congress issued

Extracts from the Votes and Proceedings of the American Continental Congress, Held at Philadelphia on the fifth day of September, Containing, The Bill of Rights, a List of Grievances, Occasional Resolves, The Association, An Address to the People of Great Britain, and a Memorial to the Inhabitants of the British American Colonies.64

The Continental Congress ordered these extracts published in both English and German.65 During that same year, the Continental Congress issued a proclamation in French, addressed to the inhabitants of Quebec, informing them of the rights the American colonists claimed against the English King, and inviting them to “accede to our confederation.”66 The Congress resolved that the delegates from Pennsylvania would “superintend the translating, printing, publishing & dispersing” of the address, with the assistance of delegates from New Hampshire, Massachusetts, and New York.67

The Continental Congress also resolved that the “Rules and Articles, for the Better Government of the Troops Raised” by the Colonies, and the articles of war, be translated into French.68 Another resolution of Congress “[o]rdered that the delegates of the Colony of Pennsylvania procure letters from the German clergy,” letters presumably written in German, “to

63. See id.
64. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 135 (1905) (1774).
65. Id.
66. Id. at 105-13. The Continental Congress was apparently very interested in persuading Canadians to join the revolutionary effort. In its instructions to R.R. Livingston, Robert Treat Paine, and John Langdon, Esq., the Congress exhorted them to “repair, with as much despatch” as possible to Ti- conderoga and to “exert [their] utmost endeavours to induce the Canadians to accede to a union with these colonies.” 3 id. at 340 (1905) (1775).
67. 1 id. at 113 (1904) (1774). The Continental Congress authorized payment of eight dollars to Du Simitiere for translating the address of the united colonies to the inhabitants of Quebec. 3 id. at 286 (1905) (1775). One thousand copies of the address were printed for distribution in Canada. Id. at 507.
68. 3 id. at 512 (1905) (1775).
their friends and countrymen” in New York and North Carolina.69 An address to the people of Ireland was translated into German.70 The Congress also issued an address “To the People in General, and particularly to the Inhabitants of Pennsylvania,” in both English and German.71

In addition to these attempts to win the allegiance of German and French speaking peoples, the Continental Congress recruited German colonists and their sons for military service during the Revolutionary War. On May 25, 1776, Congress resolved “That one battalion of Germans be raised for the service of the United Colonies.”72 The battalion was to be composed of “four companies of Germans . . . in Pennsylvania, and four companies in Maryland.”73 The language of command of the German battalion was probably German.74 On December 1, 1776, the Congress ordered the “German Batallion to march immediately to join General Washington.”75

During the Revolutionary War, other documents were translated into German. In 1777, an address of the convention of New York to the people of New York was translated,76 and 1000 copies were published in German.77

After the War, the Continental Congress published the Articles of Confederation, the first, and ultimately unsuccessful, charter for the new American government, in official English, German and French editions.78 By publishing this fundamental document in several languages, the Continental Congress explicitly recognized the linguistic and cultural pluralism within the new American realm and the need to communicate with

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69. Resolution of Congress, June 28, 1775, quoted in Kloss, supra note 2, at 75.
70. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 513-14 (1905) (1775).
71. 6 id. at 1126 (1906) (1776).
72. 4 id. at 392, 395 n.3 (1905) (1776).
73. Kloss, supra note 61, at 27.
74. Id.
75. 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 997 (1906) (1776).
76. The Continental Congress passed the following resolution:
[C]ongress have received the address of the said convention to the people of that State, containing sentiments highly and generally interesting to the inhabitants of these States, to whose serious perusal and attention it is earnestly recommended; and that the same be translated into the German language, and printed at the expence of the continent.
77. 7 id. at 42 (1907) (1777).
78. 9 id. at 1081 (1907) (1777).
79. Id. at 1088.
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linguistically different populations in the languages they understood. The Continental Congress also realized clearly the importance of language as a political instrument. The Congress, hoping to communicate with and win the allegiance of American peoples whose language was different from English, published many significant documents in German and French.

III. THE VIEWS OF THE FRAMERS

A. THE VIEWS OF FRANKLIN, JEFFERSON AND RUSH

Given the presence of substantial populations in America that spoke languages other than English and the efforts of the Continental Congress to communicate with these populations in their own languages, it is not surprising that the Framers held and expressed views about non-English languages and cultures in America. The English resistance to language standardization, however, formed part of the Framers' inheritance in the Colonies. The legacy of failed attempts to standardize the English language in Britain provided no framework for language standardization in the fledgling United States. In the Colonies, the absence of a formal language policy left the issues of language and ethnicity to the political process.

Early friction between the core English culture and a different culture, and debate about this issue, began in Pennsylvania, with its large proportion of German-speaking citizens. Benjamin Franklin expressed a strongly negative attitude towards German-speaking colonists. Writing in 1753 to Peter Collinson, Franklin linked the German colonists with the dangers of faction and social disorder: "I am perfectly of your mind, that measures of great Temper are necessary with the Germans: and am not without Apprehensions, that thro' their indiscretion or Ours, or both, great disorders and inconveniences may one day arise among us." Franklin viewed German-speakers as ignorant, immoral, and not worthy of trust, characteristics he attributed to their German national origin and language. Franklin wrote:

Those who come hither are generally of the most ignorant Stupid sort of their own nation, and as Ignorance is often attended with Credulity when Knavery would mislead it, and with Suspicion when Honesty would set it right; and as few of the English understand the German

79. See Heath, supra note 37, at 10-11.
80. Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), in 4 THE PAPERS OF BENJAMIN FRANKLIN 483, 483 (Leonard W. Labaree et al. eds., 1961).
Language, and so cannot address them either from the Press or Pulpit, 'tis almost impossible to remove any prejudices they once entertain. . . . Not being used to Liberty, they know not how to make a modest use of it. 81

Franklin thus ascribed ignorance and other negative characteristics to those who differed not in knowledge, but in language. Indeed, in the same letter, Franklin recognized that the Pennsylvania Germans "import[ed] many Books" and operated two printing houses entirely in German, two bilingual German-English printing houses, and two German-language newspapers. 82 These facts belie Franklin's assumption that the Germans were "ignorant."

Franklin's observations demonstrate the substantial extent to which the German language and culture influenced American colonial culture in Pennsylvania:

They have one German newspaper and one half-German. Advertisements intended to be general are now printed in Dutch [German] and English; the Signs in our Streets [Philadelphia] have inscriptions in both languages, and in some places only German: They begin of late to make all their Bonds and other legal writings in their own language, which (though I think it ought not to be) are allowed good in our Courts, where the German Business so encreases that there is continual need of Interpreters; and I suppose in a few years they will be also necessary in the Assembly, to tell one half of our legislators what the other half say; In short unless the stream of their importation could be turned from this to other Colonies, as you very judiciously propose, they will soon outnumber us, that all the advantages we have will not (in My Opinion) be able to preserve our language, and even our Government will become precarious. 83

Franklin feared the Germans because he feared that their numbers could dictate outcomes in the political process and that they would undermine colonial government. This is an early expression of a fear often repeated throughout our legal history: the fear that those who are culturally different, those who speak a different language, represent a threat to our government. Franklin was writing about political control: he feared that if Germans wielded political power they would use it to undermine the established government.

Franklin also worried about the German influence upon the predominant English culture of the time. In his Observations Concerning the Increase of Mankind, Franklin lamented the presence of Germans and others who would render impure the English in America:

81. Id. at 483-84.
82. Id. at 484.
83. Id. at 484-85.
And since Detachments of English from Britain sent to America, will have their Places at Home so soon supply'd and increase so largely here; why should the Palatine 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, and will never adopt our Language or Customs, any more than they can acquire our Complexion.  

Franklin's negative attitude toward the Germans is particularly obvious in this excerpt, in which he refers to them as a "swarm" and as "boors," racially different from the English.

In contrast to the contempt Franklin held for the Germans and their language and culture, other Framers encouraged multilingualism as a means of access to the written knowledge developed in other nations at a time when the United States had not developed a substantial scientific and artistic literature. Thomas Jefferson, himself fluent in French and a student of the Anglo-Saxon language, stated that the study of French was "absolutely essential under our present circumstances." Jefferson recognized the political utility of facility in languages other than English. Jefferson recommended the study of politics, law, and history in France, in order to facilitate the acquisition of the French language. He stated that:

With respect to modern languages, French, as I have before observed, is indispensable. Next to this the Spanish is most important to an American. Our connection with Spain is already important and will

84. BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN, supra note 80, at 227, 234. Franklin also lamented the "darken[ing]" of the people of America resulting from the importation of African slaves. He commented that America had a "fair... opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red." Id. These remarks, and some relating to Germans, were deleted from several of the editions of this essay that appeared during his lifetime. See Introduction to FRANKLIN, supra, at 225, 226 n.5.

85. Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (July 6, 1787), in 11 JEFFERSON PAPERS, supra note 15, at 556, 556-57 (1955). Jefferson, however, was not free of ambivalence about multilingualism in the political arena. He proposed sending 30,000 Anglophones to the Louisiana territory to prevent the population from preserving its French language and legal culture. See BARON, supra note 18, at 2. Jefferson later encouraged the protection of French in Louisiana. Id. at 10.

86. See, e.g., Letter from Thomas Jefferson to Sir Herbert Croft (Oct. 30, 1798), in THE COMPLETE JEFFERSON 855 n.1, 856 n.1 (Saul K. Padover ed., 1943) (explaining the usefulness of the study of Anglo-Saxon "for explanation of a multitude of law-terms").

87. Letter from Thomas Jefferson to Thomas Mann Randolph, Jr., supra note 85, at 557.
become daily more so. Besides this the antient part of American history is written chiefly in Spanish.88

Jefferson also urged, with varying degrees of success, his family to read Don Quixote in Spanish and other works in French to maintain their facility in those languages.89

Jefferson was not alone among the Framers in his recognition of the importance of multilingualism as a means of access to knowledge. Benjamin Rush, signer of the Declaration of Independence and a leading proponent of education in post-Revolutionary America, also advocated learning several languages. In the Plan of a Federal University, he makes several observations on the importance of language study, including the study of English, Spanish, French, and German, at a proposed federal university:

The cultivation and perfection of our language becomes a matter of consequence, when viewed in another light. It will probably be spoken by more people, in the course of two or three centuries, than ever spoke any one language, at one time, since the creation of the world.... [C]onsider the influence, which the prevalence of only two languages, viz, the English and the Spanish, in the extensive regions of North and South America, will have upon manners, commerce, knowledge, and civilization.

... The German and French languages should be taught in this university. The many excellent books which are written in both these languages, upon all subjects, more especially upon those which relate to the advancement of national improvements of all kinds, will render a knowledge of them an essential part of the education of a legislator of the united states.90

Rush, like Jefferson, observed the current, and predicted the future, prevalence of Spanish. He urged his readers to acquire other languages to broaden their sources of knowledge.

88. Id. at 558; see also Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1788), in THE COMPLETE JEFFERSON, supra note 86, at 1057, 1057 (declaring that "[o]ur future connections with Spain and Spanish America will render that language a valuable acquisition").


Rush was a founder of the German college established in Lancaster, Pennsylvania. On August 31, 1785, Rush proposed the German college in a letter addressed "To the Citizens of Pennsylvania of German Birth and Extraction." Responding to the objections of "[s]ome narrow-minded people" who feared that the German college would become "the means [for the Germans] of keeping up their language in our country," Rush wrote that the Germans, "by teaching and learning in their own language, they will sooner acquire a perfect knowledge of the English language." The German college would not only preserve the German language, it would also "open the eyes of the Germans to a sense of the importance and utility of the English language and become perhaps the only possible means, consistent with their liberty, of spreading a knowledge of the English language among them."

Within two years, the German college was created. Rush described the bilingual ceremony consecrating the German college. In his address to those assembled, Rush listed some of the advantages of the bilingual college:

By means of this seminary in the 1st place, the partition wall which has long separated the English and German inhabitants of the state will be broken down.... By means of this College the English language will be introduced among our German fellow citizens. In a state where all legal proceedings as well as commerce are carried on in English, a knowledge of it must be of the utmost consequence for the preservation of property. If our Germans expected at a future day to establish their language in Pennsylvania, they never can expect to see it established in our federal councils, where they must prepare to be called to assist in the government of the United States. The English language will be absolutely necessary to qualify them for usefulness in our great national legislature.... By means of this College the German language will be preserved from extinction and corruption by being taught in a grammatical manner.

Rush believed that in a nation in which the English language was dominant, the Pennsylvania Germans would have to
master English to assist in the government and to participate fully in national affairs. His solution was to establish a German college in which the two languages would co-exist, with German-language instruction facilitating the acquisition of English.

Significantly, Rush thought that the German college, its teaching in German, would "become, perhaps the only possible means, consistent with their liberty, of spreading a knowledge of the English language" among the Pennsylvania Germans. Rush recognized that linguistic minorities would acquire English voluntarily, because of its social utility, and that legal coercion of linguistic minorities would intrude upon their personal liberty. Rush also recognized value in preserving the German language and culture. Rush did not see acquisition of English and preservation of German as mutually exclusive. On the contrary, they were complementary: acquisition of English was not inconsistent, then or now, with preservation of an American culture different from the core culture.

B. THE CONTROVERSY OVER THE ALIEN AND SEDITION ACTS: EARLY POLITICAL USES OF ETHNICITY

In 1798 Congress passed the Alien and Sedition Acts. The controversy over these acts reveals much about the nation's insecurity about its identity. Although the controversy was not about American languages, it was, in part, about American ethnicity and culture, and about defining who belongs, who does not, and why. The controversy demonstrates the tendency in American culture, manifested early in our history, to identify difference from the core English culture with "foreignness" and, further, to identify this supposed "foreignness" with the subversion of American government and American identity.

97. Letter from A Friend to Equal Liberty, supra note 92, at 366.
98. Id. at 364-65; see also Heath, supra note 37, at 14-15 (asserting that repression of others’ native languages can also provoke resistance).
100. Benjamin Franklin had earlier expressed similar views about the German people of Pennsylvania. See supra text accompanying notes 80-84.
The identification of the Republican party with the French and their foreignness, ethnicity, culture, and language, became a key Federalist strategy in an attempt to label the Republicans as traitors and to command loyalty to Federalist domestic political purposes. The Federalist fear of "foreign influence," and the attribution of internal dissent and Republican opposition to this foreign influence, provided the climate necessary for the Alien and Sedition legislation. From a very early stage in American politics, many associated "foreign influence," foreign national origin, and foreign traits with disloyalty to America and its government. Difference from the core culture was equated with disloyalty.

Jefferson described the Alien and Sedition legislation as "a most detestable thing." His revulsion for the nativist and oppressive legislation grew from his conception of the proper spheres of governmental control and individual freedom.

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101. The Federalists associated dissent from their policies with disloyalty toward the government. Indeed, despite the essentially domestic nature of the political dispute between the Federalists and the Republicans, the debate was cast in terms of aversion to or allegiance with the disruptive foreign influence of the French. A French observer, for example, wrote that each party used "'foreign influence as it need[ed], to dominate.'" SMITH, supra note 99, at 12 (quoting 1 SAMUEL E. MORISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 352 (3d ed. 1942)). An Englishman observed this same dynamic at work:

Federalist & Anti-Federalist . . . does not mean those for & against a Federal form of Government, but in fact ins & Outs, tho' it is not confessed. . . . The Federalists . . . accuse the other party of being Democrats, the Antis accuse their Opponents of being Aristocrats. The Feds. say the Antis wish to introduce Anarchy & plunder & the French, the other party say that the Federalists are contending for Monarchy Aristocracy & British influence which they allledge to be too great already.


102. See supra note 99.


104. Jefferson strongly supported the individual's freedom to choose his beliefs free from governmental interference. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Query XVII: The Different Religions Received into that State) (1782), reprinted in THE COMPLETE JEFFERSON, supra note 86, at 673, 673-76. In 1782, he discussed religious oppression in America:

The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have no authority over such natural rights,
1801, after Jefferson had become President, he wrote to Joseph Priestley and commented on the legislation.\textsuperscript{105} "What an effort," he wrote, "of bigotry in politics and religion have we gone through!"\textsuperscript{106} Likening the legislation to the witch hunts, he lamented the attempt to "bring back the times of Vandalism, when ignorance put everything into the hands of power and priestcraft."\textsuperscript{107} Jefferson expressed his "disdain [for] the legitimacy of that libel on legislation," the alien law.\textsuperscript{108}

Jefferson also expressed his optimism about the nation's rebound from the ordeal:

As the storm is now subsiding, and the horizon becoming serene, it is pleasant to consider the phenomenon with attention. . . . The mighty wave of public opinion which has rolled over it is new. But the most pleasing novelty is, its so quietly subsiding over such an extent of surface to its true level again. The order and good sense displayed in this recovery from delusion, and in the momentous crisis which lately arose, really bespeak a strength of character in our nation which augurs well for the duration of our Republic; and I am much better sat-

only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. \textit{The legitimate powers of government extend to such acts only as are injurious to others.}

\textit{Id.} at 675 (emphasis added).

In Jefferson's view, government could intrude upon individual freedom only in limited instances—when one's behavior threatened to injure another. His views were very similar in that respect to those of John Stuart Mill. Mill asserted that society simply had no right to interfere with one's conduct where that conduct did not affect others. \textit{See John S. Mill, Three Essays: On Liberty, Representative Government, The Subjection of Women} 92-93 (London, Oxford University Press 1975) (1859, 1861, 1869).

Jefferson was a strong advocate of tolerance for religious differences. He commented favorably on Pennsylvania and New York, states which had avoided any establishment of religion. Jefferson observed how many religions flourished without social strife in these states:

On the contrary, their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance, because there is no other circumstance in which they differ from every nation on earth. They have made the happy discovery, that the way to silence religious disputes, is to take no notice of them.

\textit{Jefferson, supra,} at 676. By defining so broadly his conception of individual freedom of conscience, Jefferson expressed essential principles of tolerance for cultural pluralism and diversity. \textit{But see generally Leonard W. Levy, Jefferson \& Civil Liberties: The Darker Side} (1963) (describing Jefferson's departures from his libertarian writings when demanded by personal or political expediency).

\textsuperscript{105} Letter from Thomas Jefferson to Joseph Priestley (Mar. 21, 1801), \textit{in 4 Jefferson Writings, supra} note 103, at 373, 373.

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} at 374.
So, for Jefferson, the stability of the nation was confirmed and strengthened by its rejection of xenophobia and by the triumph of tolerance of divergent opinions.

IV. EARLY EFFORTS TO ESTABLISH A NATIONAL LANGUAGE ACADEMY

A. JOHN ADAMS PROPOSES A NATIONAL LANGUAGE ACADEMY

On September 5, 1780, John Adams, then on a diplomatic mission to Europe, wrote a letter to the President of Congress, suggesting the establishment of a national language academy. He proposed an "American Academy for refining, improving, and ascertaining the English Language." In Adams's view, language was a political instrument: "It is not to be disputed that the form of government has an influence upon language, and language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." Like Rush, Adams felt that English was destined to become a language of the world because of the growing American population, America's growing international influence, and the still prominent stature of England. Adams also desired to establish the superiority of the new American form of government, which could distinguish itself by establishing a national language academy, a feat which had eluded England.

109. Id.
110. Letter from John Adams to Samuel Huntington (Sept. 5, 1780), in 7 THE WORKS OF JOHN ADAMS 249, 249-50 (Charles F. Adams ed., Boston, Little, Brown & Co. 1852) [hereinafter ADAMS WORKS]. In 1778, John Adams was sent on a diplomatic mission to help negotiate peace with Great Britain and obtain financial assistance for the new nation. Heath, supra note 37, at 19. He conceived of the idea of a national language academy during his stay in Amsterdam. Id. While Adams dined with a group of Dutch men, a lawyer commented to him "that English would be the general Language in the next Century, and that America would make it so." John Adams, Diary Entry (Aug. 28, 1780), in 2 DIARY & AUTOBIOGRAPHY OF JOHN ADAMS 446, 446 (L.H. Butterfield ed., 1961). In a diary entry he made after the dinner, Adams concluded that "[i]t w[ould] be the Honour of Congress to form an Academy for improving and ascertaining the English Language." Id. A week later he wrote to Samuel Huntington, the President of Congress, with his proposal. See Letter from John Adams to Samuel Huntington, supra, at 249-50.
111. Letter from John Adams to Samuel Huntington, supra note 110, at 250.
112. Id. Scholars advanced proposals for such an academy sporadically during the eighteenth century. See Allen W. Read, American Projects for an Academy to Regulate Speech, 51 PUBLICATIONS MOD. LANGUAGE ASS’N 1141, 1141-44 (1936).
113. See Letter from John Adams to Edmund Jenings (Sept. 23, 1780), in 9
Only Congress, according to Adams, could give this Academy "reputation, influence, and authority through all the States and with other nations." Adams proposed that the American government follow the example set by certain European nations and standardize the English language:

Most of the nations of Europe have thought it necessary to establish by public authority institutions for fixing and improving their proper languages. I need not mention the academies in France, Spain, and Italy, their learned labors, nor their great success. But it is very remarkable, that although many learned and ingenious men in England have from age to age projected similar institutions for correcting and improving the English tongue, yet the government have never found time to interpose in any manner; so that to this day there is no grammar nor dictionary extant of the English language which has the least public authority . . . .

The honor of forming the first public institution for refining, correcting, improving, and ascertaining the English language, I hope is reserved for congress; they have every motive that can possibly influence a public assembly to undertake it. It will have a happy effect upon the union of the States to have a public standard for all persons in every part of the continent to appeal to, both for the signification and pronunciation of the language.

Adams wrote that, "[u]pon a recommendation from congress, there is no doubt but the legislature of every State in the confederation would readily pass a law making such a society a body politic." In Adams's view, both federal and state governments would use language to shape the sentiments of the people.

Adams's proposal was sent to committee, where it died. Congress apparently never acted on, nor debated, Adams's proposed Academy. Just as the proposed Academy in England was thought to be "unsuitable to the genius of a free nation,"

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ADAMS WORKS, supra note 110, at 510, 510. Two weeks after his letter to Samuel Huntington, Adams wrote to Edmund Jenings:

I have written to Congress a serious request, that they would appoint an academy for refining, correcting, improving, and ascertaining the English language. After Congress shall have done it, perhaps the British king and parliament may have the honor of copying the example. This I should admire. England will never have any more honor, excepting now and then of imitating the Americans.

Id.

114. Letter from John Adams to Samuel Huntington, supra note 110, at 250.
115. Id. at 249-50.
116. Id. at 251.
117. See Heath, supra note 37, at 20.
118. Id. at 22.
119. Id.
120. PRIESTLEY, supra note 50, at vii, quoted in Read, supra note 45, at 149.
so Congress was not persuaded of the necessity for such an academy. According to Professor Heath, federally sponsored cultural institutions "faced severe obstacles during the early years of the Republic." They were associated with monarchies, and Adams, a leading Federalist, was often viewed as a monarchist. His proposal for a centralized language academy was likely viewed as evidence of his monarchist preferences. Adams's proposal was doomed to failure. It was inconsistent with principles of individual liberty, and it had the taint of monarchist association.

B. PRIVATE EFFORTS TO ESTABLISH A LANGUAGE ACADEMY

Although Congress failed to act upon Adams's suggestion that the federal government establish and support a national language academy, some years after the controversy over the Alien and Sedition Acts several leading American intellectuals persevered in efforts to establish language standardization through private means. Noah Webster was chief among them. In his *Dissertations on the English Language*, Webster made a plea for recognition and standardization of a national language:

We have therefore the fairest opportunity of establishing a national language, and of giving it uniformity and perspicuity, in North America, that ever presented itself to mankind. . . .

121. Heath, *supra* note 37, at 22.
122. *Id.*
123. *Id.*
124. Language standardization—creating uniformity within a single language—is not the same as attempting to establish an official language by seeking governmental support and imprimatur for one language among many. Nevertheless, the views of the Framers with respect to language standardization are important to the study of official language policy in several ways. First, some Framers, such as John Adams, believed that language standardization was consistent with, and even integral to, federal recognition of English. Noah Webster shared this view. See infra text accompanying notes 126-28. Others, however, including Chief Justice Marshall, appear to have regarded language standardization as an unnecessary infringement upon individual liberty, a view similar to the views which prevailed in England. See infra text accompanying notes 153-59. Their opinions on standardization may thus suggest their views on official English laws, which, in my view, represent an even greater infringement on individual liberty. Finally, the Framers' commentary on language standardization illustrates their views on the relation of language to American society.

[A] national language is a band of national union. Every engine should be employed to render the people of this country national; to call their attachments home to their own country; and to inspire them with the pride of national character. . . .

Let us then seize the present moment, and establish a national language, as well as a national government. Let us remember that there is a certain respect due to the opinions of other nations. As an independent people, our reputation abroad demands that, in all things, we should be federal; be national; for if we do not respect ourselves, we may be assured that other nations will not respect us.

Webster's efforts at language standardization between 1783 and 1828 resulted in several publications, including his American Dictionary of the English Language, published in 1828. Webster recognized, in the preface to his 1828 dictionary, that language was an instrument of the people and that there could be no final federal authority on matters of language. Webster nonetheless sought endorsement for his new dictionary from the Supreme Court of the United States. Webster's request for endorsement was, however, rejected by Chief Justice John Marshall.

The desire of certain leading intellectuals of the day for language standardization resulted in the establishment, in 1820, of the American Academy of Language & Belles Lettres, a private academy which lasted only a few years. Its founders established the Academy despite their awareness of the objections to a national language academy. Its goals, as stated in its first circular, were to guard the English language against "local or foreign corruptions," to settle issues of spelling and word usage, and "generally, to form and maintain, as far as [practicable], an English standard of writing and pronunciation, correct, fixed, and uniform, throughout our extensive territory." Such linguistic uniformity would, in the Academy's

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127. Id. at 397.
128. Id. at 406.
129. Heath, supra note 37, at 24. His early efforts enjoyed only limited success: he sold 2500 copies of this dictionary. Id. Webster was later forced to mortgage his home to produce a second edition, and he was frequently in debt because of the limited success of his books on language. Id.
130. Id. at 25.
131. Letter from John Marshall to Noah Webster (Jan. 14, 1831) (unpublished manuscript, on file with Noah Webster Manuscripts, New York Public Library) (discussing the justices' resolution "not to subscribe to any paper of the character of that proposed by you at this place or in a body").
132. See Heath, supra note 37, at 27, 28-35. There were earlier attempts to establish a similar society. Id. at 26-27.
133. See id. at 29-34.
134. AMERICAN ACADEMY OF LANGUAGE & BELLES LETTRES, CIRCULAR
view, promote the development of an American literature.\textsuperscript{135} That development would help make the new nation great just as the European language academies had promoted their respective nations.\textsuperscript{136} The founders of the private Academy, like John Adams before them,\textsuperscript{137} recognized the important political role of language: "The commanding influence of literature upon national wealth and power, as well as morals, character, and happiness, especially in free communities, will not be doubted by those whose minds have been most directed to this interesting branch of civil policy."\textsuperscript{138}

By the time of the publication of its second circular, dated July 12, 1821, the Academy's president was John Quincy Adams, then Secretary of State.\textsuperscript{139} Its contributors, members, and honorary members included: Chief Justice John Marshall and Justices Joseph Story, John Jay, and Brockholst Livingston of the Supreme Court; former Presidents John Adams (by then deceased), Thomas Jefferson, and James Madison; President James Monroe; and numerous other prominent Americans, including Noah Webster.\textsuperscript{140} In the second circular the Academy remained faithful to its original purpose of standardizing the English language.\textsuperscript{141} The Academy recognized the power of education, like language, as an instrument of political control: "Improvement in mind and morals will lessen the power of

\textsuperscript{135} Heath, supra note 37, at 29.
\textsuperscript{136} Id.
\textsuperscript{137} See supra notes 111-13 and accompanying text.
\textsuperscript{138} CIRCULAR I, supra note 134, quoted in Heath, supra note 37, at 30.
\textsuperscript{139} See AMERICAN ACADEMY OF LANGUAGE & BELLES LETTRES, CIRCULAR, at 3 (New York 1821) [hereinafter CIRCULAR II].
\textsuperscript{140} Id. at 3-4.
\textsuperscript{141} Id. at 13. The Academy formed a committee to compile "a list of words and phrases, whether acknowledged corruptions or words of doubtful authority, which are charged upon us as bad English, with a view to take the best practical course for promoting the purity and uniformity of our language." Id.

The second circular demonstrates that the Academy, while still concerned with promoting the United States through its language, broadened its aims to include improving the education of the poor and of children. See Heath, supra note 37, at 31. These broadened goals may have been a response to criticism of its aristocratic image and its self-styled similarity to the aristocratic academies of Europe. See id.
In January, 1822, the Academy issued its final publication, *Circular III*, which included several letters from its members and patrons. This circular acknowledges some of the difficulties inherent in fulfilling the Academy's goals in a constitutional democracy: "Those institutions, among other nations, which, in their organization, have had the aid of kings and national treasuries, were free from many difficulties which attend our Association; because they were formed for countries of less extent, much better known, and whose talents and resources were altogether more concentrated." In America there was no support for the Academy from the government and there could be none from any King.

One of the letters printed in this circular was from the late President John Adams. Remaining true to the spirit of his unsuccessful proposal, forty years earlier, for a national language academy, Adams was "exceedingly delighted" with the plans for the Academy. Furthermore, he wrote, "[t]he plan is worthy [of] the adoption of the national government, and it will be

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143. *See American Academy of Language & Belles Lettres, Circular III* 5-40 (New York, Charles Baldwin 1822) [hereinafter *Circular III*]. *Circular III* contained correspondence from its members which reflected their differing views. The Honorable John Trumble of Connecticut expressed concern about the difficulties the Academy faced, but acknowledged some of its advantages:

To attempt the formation of a national language, different from the English in its dialect, would indeed be absurd and impracticable. To fix the standard of a living language, and think to arrest the progress of innovations which many will adopt as improvements, though condemned by others as corruptions, is a task of equal difficulty. Yet . . . the unified efforts of distinguished scholars . . . will assist us to banish cant phrases; to correct vulgar solecisms and improprieties; to check the affected pomp of pedantry, and prevent the introduction and increase of foreign phraseology, inconsistent with the idioms of the English language.

Letter from John Trumbull to William S. Cardell (May 5, 1820), in *Circular III*, supra, at 6, 6.

Governor Oliver Wolcott of Connecticut asserted that "[i]t is scarcely two hundred years, since the English language was first adopted as the language of science and philosophy in England itself." Letter from Oliver Wolcott to William S. Cardell (Dec. 22, 1820), in *Circular III*, supra, at 7, 7. He also observed that the rapid spread of English through North America, Asia and Africa resulted from "improvements in science and the arts" and the language's growing use in international commerce. *Id.*

144. *Circular III*, supra note 143, at 3.
145. *See Heath*, supra note 37, at 34.
an immortal honor to our Congress to incorporate, to establish and endow it, with sufficient funds, to defray all its necessary expenses.” Adams also repeated his criticism of Great Britain's failure to adopt a language academy: “Men of letters throughout all Europe have long expressed their wonder, that the British Parliament have been so inattentive to the cultivation of their own language. . . . [T]he government have instituted nothing for the improvement of their language.”

Thomas Jefferson warned that the Academy should not focus on fixing standards for the English language, but rather on elaborating vocabulary to facilitate scientific progress. Jefferson rejected fixing the language based either on the language of England or on the model of the European academies:

There are so many differences between us and England, of soil, climate, culture, productions, laws, religion, and government, that we must be left far behind the march of circumstances, were we to hold ourselves rigorously to their standard. If, like the French Academicians, it were proposed to fix our language, it would be fortunate, that the step was not taken in the days of our Saxon ancestors whose vocabulary would illy express the science of this day.

Of course, the French and other European language academies were exactly the models the founders of the Academy of “Belles Lettres” had in mind. Jefferson thus gently ridiculed the Academy by pointing out the absurdity of its goals. Fixing the Saxon language in the time of the Saxons would have severely inhibited cultural development and scientific progress.

Chief Justice Marshall also responded to the Academy. Marshall believed that the intermingling of social classes in America, and not governmental or private intervention, would result in language standardization of its own momentum:

At present, the intermingling of classes; the intercommunication of well educated persons with those whose improvement is very limited; the removals from one neighborhood and state, to another distant neighborhood, and another state; the intimate intercourse thus kept up between all ranks, and the different parts of our extensive empire, all contribute to preserve an identity of language through the United

147. Id.
148. Id.
149. Letter from Thomas Jefferson to William S. Cardell (Jan. 27, 1821), in CIRCULAR III, supra note 143, at 10, 10, cited in Heath, supra note 37, at 33.
150. Id.
151. See Heath, supra note 37, at 29.
152. Letter from Thomas Jefferson to William S. Cardell, supra note 149, at 10, cited in Heath, supra note 37, at 33.
States, which can find no example in other parts of the world.\textsuperscript{153}

In Marshall's view, unique characteristics of American liberty, the exceptional geographical and social mobility of American people and their necessary intermingling, were sufficient to maintain identity of language. The social and commercial contact among the American people would alone be sufficient to preserve a national language. Furthermore, Marshall clearly anticipated that, as conflicts over language arose, they would be settled by individuals responding to local conditions. The intimate intercourse of the American people with each other was both a necessary and sufficient condition for the resolution of language differences, rendering further standardization unnecessary.\textsuperscript{154} Marshall also warned against the overzealous patriotism of extreme advocates of language standardization and urged a more tempered posture: "The present state of society, give to the European portion of the commonwealth of letters, some right to take the lead; but Americans may co-operate in the joint work, and may exercise their own judgment on the performance of their fellow laborers, as well as on their own."\textsuperscript{155}

Marshall's view of language standardization is also suggested in his response to Noah Webster's request for the Supreme Court's official endorsement of his dictionary and other written works.\textsuperscript{156} Marshall refused to endorse Webster's dictionary on behalf of the Supreme Court. Marshall wrote that the Court, as a governmental body, could not endorse the dictionary.\textsuperscript{157} He explained that the justices could provide such an endorsement only in their individual capacities, if they chose to, and not in their official capacities.\textsuperscript{158} Marshall's response suggests that he viewed language choice and standardization as matters for individual, not governmental, decision.\textsuperscript{159}

Interestingly, Marshall's insights regarding the intermingling of peoples and the operation of local communities in resolving language matters were confirmed in states that had

\begin{footnotesize}
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\item[153.] Letter from John Marshall to William S. Cardell (June 25, 1821), in \textit{Circular III}, \textit{supra} note 143, at 10, 10-11, \textit{quoted in Heath, supra} note 37, at 33-34.
\item[154.] \textit{See Heath, supra} note 37, at 33.
\item[155.] Letter from John Marshall to William S. Cardell, \textit{supra} note 153, at 10, \textit{quoted in Heath, supra} note 37, at 33.
\item[156.] For another discussion of this letter, see \textit{supra} note 131 and accompanying text.
\item[157.] Letter from John Marshall to Noah Webster, \textit{supra} note 131.
\item[158.] \textit{Id.}
\item[159.] \textit{See Heath, supra} note 37, at 33.
\end{enumerate}
\end{footnotesize}
substantial linguistic minorities. Marshall’s insight also helps explain why English has remained the dominant language of the United States since the nation’s inception, despite the presence of groups speaking other languages. The intermingling of peoples in our nation, coupled with the early and continuous dominance of English, has resulted in virtually universal knowledge of English among American residents, without the imposition of a standard or official language by the government.

Ultimately, as Marshall envisioned, the resolution of language issues at the local level made the private Academy unnecessary. Its national aims never were fulfilled. The Academy published no further circulars. Despite John Adams’s call for national sponsorship of the Academy and its goals, no pleas to Congress were made and Congress never acted on its behalf. The unique characteristics of American society and liberty allowed communities to adopt local solutions to any language problems that arose, rendering any academy, public or private, unnecessary.

V. APPEALS TO CONGRESS FOR OFFICIAL PUBLICATIONS IN GERMAN

A. EFFORTS TO OBTAIN FEDERAL PUBLICATIONS IN GERMAN, 1794-1798

Between the late eighteenth century and the mid-nineteenth century, America’s German-speaking minority lobbied Congress to print federal laws and documents in German as well as in English. In early 1794, German citizens living in Augusta County, Virginia, petitioned Congress to print official versions of federal laws in German. On April 1, 1794, Representative Preston read the motion of a committee of the House of Representatives, which provided that the “Secretary of State [is] authorized to have such proportion of the laws of the United States printed in the German language as he may think proper and necessary to accommodate the German citi-

160. See discussion infra part VI.
162. Heath, supra note 37, at 34.
163. Id.
164. Id. at 34, 35.
165. KLOSS, supra note 61, at 28.
zens of the United States." Apparently no vote was taken on this motion. Reintroducing the proposal, Representative Moore read the recommendation of a House committee, which stated that

the provision heretofore made has been entirely inadequate to the purpose of a due promulgation of the laws; that it is become expedient to extend the provision on this subject to the commencement of the Government under the present constitution. That for the accommodation of such Germans, citizens of the United States, as do not understand the English language, it will be necessary that the laws be translated, and printed in the German language.

Accordingly, the committee recommended printing "complete sets of the laws of the Congress" in German. These German editions of the federal laws were to be distributed in such proportion as representatives from districts containing German citizens certified were necessary to the Secretary of State. The committee recommendation was defeated by a vote of 41 votes for, and 42 votes against. The Speaker of the House at the time, F. A. Muhlenberg, apparently vacated his post at the time and did not cast a vote, therefore possibly contributing to the defeat of the measure by just one vote.

Reintroduced the next year, the proposal underwent "a very long discussion." Supporting the publication of the laws in German, Representative Hartley suggested that

it was perhaps desirable that the Germans should learn English; but if it is our object to give present information, we should do it in the language understood. The Germans who are advanced in years cannot learn our language in a day. It would be generous in the Government to inform those persons. Many honest men... were led away by misrepresentation; ignorance of the laws laid them open to deception.

166. H.R. Doc. No. 50, 23d Cong., 1st Sess. 81 (1834) (proposal regarding "Laws published in the German Language").
167. KLOSS, supra note 61, at 28.
168. H.R. Res. 59, 3d Cong., 2d Sess. (1794); see also KLOSS, supra note 61, at 28 (discussing Congress's consideration of the proposal to print federal laws in German).
169. H.R. Res. 59, supra note 168.
170. ANNALS OF CONG., 3d Cong., 2d Sess. 1082 (1795); KLOSS, supra note 61, at 28.
171. KLOSS, supra note 61, at 28.
172. Id. This later became known as the "Muhlenberg legend," according to which German nearly became the official language of the United States. According to the legend, Congress, newly independent from Great Britain, wanted to abolish English as the official language and replace it with German. Muhlenberg's actions, however, thwarted the proposal. Id.; see also Heath, supra note 97, at 41 n.3 (stating that the legend was "widespread among lesser historians of the nineteenth century").
173. ANNALS OF CONG., 3d Cong., 2d Sess. 1228 (1795).
It had been the practice in Pennsylvania to publish the laws in English and German. Good consequences had resulted from it.\textsuperscript{174} Hartley identified an important issue here. If the goal of government is to communicate information, it can do so best in the languages understood by its citizens. The goal of teaching Americans the language of the core culture is a different goal.

Some representatives opposed the proposal. Representative Murray said that "it had never been the custom in England to translate the laws into Welsh or Gaelic, and yet the great bulk of the Welsh, and some hundred thousands of people in Scotland, did not understand a word of English."\textsuperscript{175} The resolution that resulted from this discussion contained no language regarding publication of the laws in German.\textsuperscript{176} Apparently the resolution never came to a vote.\textsuperscript{177}

Later, in 1798, there were new attempts to have government documents published in German. A message by President Adams, delivered on April 7, 1798, was published in German.\textsuperscript{178} Two requests by Congressmen Brook and Williams for the printing of more German copies of the President's message were rejected after lengthy debate on the House floor.\textsuperscript{179}

B. THE CONGRESS DEBATES FEDERAL PUBLICATIONS IN GERMAN, 1835-1862

Like the efforts of the 1790s, there were subsequent efforts to persuade Congress to publish certain documents in the German language. From the 1830s until about 1860, German immigration to America increased considerably.\textsuperscript{180} In 1835, German liberals petitioned Congress, apparently without success, to publish its proceedings and legislation in German.\textsuperscript{181} In 1843, Representative Ramsay introduced a resolution "to procure, in the German language, 3000 copies of the President's message, for the use of the members of this House."\textsuperscript{182} Representative Slidell of Louisiana suggested printing documents in French.\textsuperscript{183}

\textsuperscript{174} Id. at 1228-29 (paraphrasing Rep. Hartley).
\textsuperscript{175} Id. at 1229.
\textsuperscript{176} Id.
\textsuperscript{177} Kloss, supra note 61, at 28.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 29.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Cong. Globe, 28th Cong., 1st Sess. 23 (1843).
\textsuperscript{183} Kloss, supra note 61, at 29.
After a long debate and three votes, these proposals were tabled without further legislative action.\textsuperscript{184}

On April 24, 1862, Representative Walton of Vermont presented a resolution calling for the printing of 200,000 extra copies of the Patent Office Report on Agriculture for 1861.\textsuperscript{185} Representative Aldrich, from Minnesota, moved to amend the resolution to provide that “fifty thousand copies of said report be printed in the German language.”\textsuperscript{186} A fascinating debate on the political implications of official publications in languages other than English ensued,\textsuperscript{187} a debate that foreshadowed current debates about official English.

Representative Morrill vehemently opposed Aldrich’s motion. Morrill stated, incorrectly,\textsuperscript{188} that “[i]t would be, for the first time in the whole history of our Government, a departure, as I conceive, from the sound and correct principle which has heretofore been acted on, of printing our documents in the English language.”\textsuperscript{189} Morrill argued that if documents were printed in German, then they also would have to be printed in other languages spoken by American populations, such as the French-speaking and Norwegian-speaking populations. He also complained about the cost of publication in German, which would cost as much as publication in English, “and probably much more.”\textsuperscript{190} Morrill then commented on the issue of assimilation:

I am in favor of having the foreign population which comes here assimilated with and become Americans. There is no reason why this [amendment] should be adopted in behalf of the German Population, for . . . they are educated, and understand, perhaps, more in relation to languages than any other class of foreign population that comes to this country. . . . I consider the proposition as unsound in principle, and as utterly subversive of the true doctrine of the country, and I hope we shall continue to hold to the sound and safe practice of print-

\textsuperscript{184} CONG. GLOBE, 28th Cong., 1st Sess. 23 (1843).
\textsuperscript{185} CONG. GLOBE, 37th Cong., 2d Sess. 1820 (1862).
\textsuperscript{186} Id. Aldrich later lowered the proposed number of German copies to 25,000. The debate first centered on the appropriate number of copies to be printed in German. In response to Aldrich’s suggestion, Representative Holman proposed increasing the number to 40,000, one-fifth of the total, a recognition “that the great body of the German population is engaged in agricultural pursuits” and that this number would constitute a “fair proportion to be published in German.” Id.
\textsuperscript{187} See id. at 1820-43.
\textsuperscript{188} The Continental Congress had issued a number of its publications, including the Articles of Confederation, in German and French as well as English. See supra notes 64-71 and accompanying text.
\textsuperscript{189} CONG. GLOBE, 37th Cong., 2d Sess. 1821 (1862).
\textsuperscript{190} Id.
Publication of the report exclusively in English, Morrill believed, would speed the assimilation of the "foreign" German-speakers to the English language and American culture and avoid the problems of different language-minority citizens competing for publications in their own languages. He was apparently unaware that many of the German speakers were Americans and, therefore, not "foreign" except in the sense that their culture differed from the core English-speaking culture. Like the Federalists during the Alien and Sedition Act controversy, Morrill equated German, an American language different from English, with subversion of "the true doctrine of the country." Once again, "foreign influence" is construed as a vehicle for subversion.

Representative Washburne of Illinois responded to Morrill's arguments. He urged adoption of the resolution as a "measure of justice to our German population." Washburne noted that the German population numbered in the hundreds of thousands and that they were mostly agriculturists, many of whom did not understand English. Since this population did not understand English, publishing the agricultural report in English deprived them of the benefit of the report. Washburne felt that the German-speaking population was entitled to information in a language they could understand:

I ask the House if they are willing to see these honest, patriotic, and liberty-loving citizens of our country, who have rallied, sixty thousand strong, under our flag to fight the battles of the country, deprived of that information to which they are entitled...? The practice has been already inaugurated in many of the States of publishing documents in the German language, and who has ever complained of the evil result of that? No one. I am proud to say that in my own State [Illinois], where we have so many of those estimable and patriotic citizens, we are not unwilling to print documents in German, in order that all Germans may read and understand what the Government is doing—a Government which they contribute, in so great a degree, to sustain and uphold, not only by their labor, but by their blood..." 

Washburne then addressed Representative Morrill's cost argument. Washburne described the cost of printing 25,000 German copies of the report as "paltry" and a "drop in the bucket." He urged the House to adopt Representative Aldrich's resolution: "Let us pay this compliment, so well de-
served by our German citizens. They are a grateful people, and it will add still further to their generous love of their adopted country."195 Responding to the argument that French-speaking or Norwegian-speaking citizens also would want documents printed in their respective languages, Washburne stated that when the numbers of French speakers was similar to the number of German speakers, then it would be appropriate to "mete out to them the same measure of justice I would now mete out to the Germans."196

Shortly after Representative Washburne's comments, a resolution to print 25,000 copies of the agricultural report in German passed by a narrow margin.197 Remarkably, the next day Representative Walton of Vermont introduced a resolution rescinding the printing of the agricultural report in German. Walton's resolution introduced a fresh round of debate on the issue.198

Walton commented that the prior day's resolution would require employing a corps of German translators and acquiring type for printing in German or hiring German printers to perform the work.199 Furthermore, questioned Walton, if the German-speaking citizens were entitled to this report in German, were they not also entitled to other government documents in German, including the "laws and debates of Congress in German?"200

Walton then posed the crucial question: "I submit the question whether we are to have a national language or not?"201 Representative Maynard asked a similar question: "I should like, if it be in order, to ask the question whether, in point of fact, we have any legal language or not?"202 For procedural reasons, these questions were not answered or debated, and Walton's resolution rescinding the printing of the agricultural report in German was adopted.203

The crucial question, whether we have a national language,

195. Id.
196. Id. At this point in the debate, the congressmen engaged in banter about the partisan and politically self-serving nature of the debate, which provoked laughter on the House floor. Id.
197. Id. The resolution passed on April 24, 1862 by a vote of 57 for, 51 against. Id.
198. See id. at 1842-43.
199. Id. at 1842.
200. Id.
201. Id.
202. Id.
203. Id. at 1842-43. A motion from Representative Washburne to table
was asked but never answered. In fact, no national or "legal" language existed. Rather, the nation had a dominant, prevalent language, English, and many other American languages. The Congress had authorized the printing of an agricultural report in German, for the benefit of German-American citizens, for a single day. The swift rescission of this act, and the extensive debate surrounding the resolution, are ample evidence of the controversy and ambivalence surrounding congressional acknowledgement of German as an American language in the 1860s. During the nineteenth century, however, several states were much less ambivalent about accommodating their citizens who spoke German, Spanish, and French.

VI. OFFICIAL MULTILINGUALISM IN THE STATES

In The Kentucky Resolutions, Thomas Jefferson argued that the Alien and Sedition Acts unconstitutionally infringed the powers reserved to the states and to the people under the Tenth Amendment. Jefferson saw the states as the protectors of individual liberties against federal tyranny. As Jefferson had foreseen, the states protected the different languages of minorities to a much greater extent than the federal government did. As long as persons who spoke different languages constituted a sufficiently powerful political force in their states, they were able to obtain state recognition of their different languages in state law. The very significant extent of state legal recognition of languages other than English is a largely unknown aspect of our legal history.

This section describes the official recognition of various American languages in the states and focusses on a few states with rich legal histories of multilingualism: first Pennsylvania, with its long official recognition of German; next California and New Mexico, with their rich histories of official bilingualism in Spanish and English; and finally Louisiana, with its history of bilingualism in French and English. Several other states granted, in one form or another, official recognition to the languages of their citizens, usually English plus one additional language.

Walton's motion was pending at the time Maynard asked his question. Washburne's motion was defeated, and Walton's resolution passed. See The Kentucky Resolutions (1798), reprinted in The Complete Jefferson, supra note 86, at 128, 128-34. See id. at 129. Other writers have covered various aspects of this state-sponsored multilingualism. See, e.g., Baron, supra note 18, at 112-32 (discussing language
This section has several purposes. It documents our history of cultural and linguistic pluralism, as it has been recognized in the laws of various states. Describing this history reveals the largely unsuspected extent of official state recognition of the different languages of America. The history reveals the great extent to which the myth of American linguistic homogeneity in English has obscured a reality far more complex and diverse. Many American languages coexisted, often with legal parity, in the states for a long time. The history shows that our roots have always lain in cultural pluralism.

A. PENNSYLVANIA

A significant population of German-speaking immigrants, over one-third of the state’s population, inhabited Pennsylvania before the Revolutionary War. According to the 1790 census, 160,000 of the state’s 434,373 inhabitants were German.\(^{207}\) German was the standard language in the area where the German population was concentrated.\(^{208}\) The German citizens of America wielded wealth and political power, which they used to influence federal and state legislatures. They proved their patriotism by sending a German-speaking battalion to fight in the Revolutionary War\(^ {209}\) and by participating in the Philadelphia conventions of 1774 and 1775.\(^ {210}\)

After the Revolutionary War, the German-speaking population of Pennsylvania had significant political influence. The Pennsylvania Germans, United States citizens, persuaded the state legislature to authorize the official publication of the Pennsylvania laws in German, as well as in English, in 1805.\(^ {211}\) On April 4, 1805, Governor Thomas McKean approved legislation authorizing him to procure “one thousand copies of the

\(^{207}\) See generally KLOSS, supra note 61 (examining our history of bilingualism).

\(^{208}\) See KLOSS, supra note 61, at 140. A number of Pennsylvania Germans migrated to North Carolina during the colonial period, bringing German to North Carolina, where it flourished until the nineteenth century. See William H. Gehrke, The Transition from the German to the English Language in North Carolina, 12 N.C. HIST. REV. 1, 1 (1935).

\(^{209}\) See supra notes 72-75 and accompanying text.


\(^{211}\) Fedynskyj, supra note 206, at 464.
laws . . . together with the constitution of the United States and of this State, to be translated, digested and published in the German language." The actual publication of the laws in German occurred two years later. The editors of this publication expressed their hope to be able to continue the publication, in German, of the state laws every two years. On April 7, 1807, the legislature authorized the Secretary of the Commonwealth to "distribute the journals [of the General Assembly] printed in the German language."

Although publication of the Pennsylvania state laws in German did not occur every two years, subsequent editions of the laws in German were published. During the 1836-37 legislative session, the legislature passed an act requiring the Secretary of the Commonwealth "to contract, (annually,) for the printing and delivery in the German language, of a number of copies of the laws of the present and future sessions of the legislature, sufficient to supply such persons as now are . . . entitled to receive the copies of the laws in the English language." In 1840, the legislature authorized the printing of 1200 copies of the laws in German.

During 1837 and 1838, Pennsylvania held a constitutional convention to consider amendments to the state constitution. One of the proposed amendments provided for public education, at state expense, for Pennsylvania schoolchildren. A further series of amendments, much debated, concerned the proper languages of instruction for public education. At the time, German speakers constituted approximately one-third of the population and owned about one-third of the wealth of the state. Although not enacted, an amendment was offered providing that public education would be conducted "in the Eng-

213. Fedynskyj, supra note 206, at 468 & n.23.
214. Id.
218. For another discussion of the Pennsylvania Constitutional Convention of 1837-38, see BARON, supra note 18, at 74-83.
219. 5 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 224 (1838) [hereinafter PENNSYLVANIA PROCEEDINGS].
220. Id. at 281.
lish or German languages.” Ultimately, however, Pennsylvania went further than any other state in giving official sanction to public education in more than one language. The debate on the constitutional amendments focussed on the propriety of giving legal sanction to education in more than one language. This debate is important because it demonstrates the lawmakers' sophisticated awareness, at an early time in this nation's history, of the implications of creating constitutional or statutory status for one or another language.

Delegates who opposed creating official sanction for two languages expressed concern that such sanction would be divisive:

Suppose the authorities of England, France or Spain, should attempt to keep up two languages in their governments. Why, we would look upon them as being deranged, to think of such a thing. What earthly object could there be in keeping up two languages in a country, when it is known that it would only be attended with difficulty, create distrust, and perhaps be the cause of public excitement.

Once again, some legislators considered a language or culture other than the English to be destabilizing, productive of faction, even "deranged." Opponents of the amendment felt that official sanction for two languages in the law would create nefarious class distinctions and would encourage voting on the basis of ethnic loyalty, rather than on some other basis. Presumably legislators sharing the ethnicity of the core English culture were scared of losing votes. They labelled a vote based on "ethnic loyalty" as disloyal or somehow suspect, when it might be a vote for the most adequate representation. The concern about voting according to ethnic loyalty, however, was expressed only regarding the Germans, and not regarding members of the core English-speaking culture voting for each other.

Opponents emphasized that "intelligent Germans" wanted no such distinction based on language. One delegate expressed the view that Germans did not desire public education in German because it was "of very little practical use to them. All the public records have been kept in English, and here all our business is transacted and carried on through the medium

221. Id. at 226.
222. Leibowitz, supra note 210, at 179. In 1837, the legislature passed a statute permitting the establishment of German-language schools on an equal footing with English-language schools. Id.
223. 5 PENNSYLVANIA PROCEEDINGS, supra note 219, at 227.
224. Id. at 228-29.
225. Id. at 229.
of the English language."\textsuperscript{226} According to some legislators, their German constituents wanted the state to cease its publications in German because they wanted to teach their children the English language, since "a knowledge of the English or the prevailing tongue, is necessary to the convenience and prosperity of their children."\textsuperscript{227} German-speaking citizens of the time knew the social and economic incentives for learning the English language.

Delegates who supported giving the German language legal recognition were concerned that, absent such recognition, the German language would slowly become extinct. Delegate Barnitz of York County, for example, made the following remarks:

Our laws . . . are carried into effect in the English language. That language has the preponderance; and my fear is, that although all languages are, in a general sense, placed upon the same footing as to giving instructions, yet that here is a leading language—in which all your laws are carried into effect, and which may tend to the suppression of all others. This is a consideration which has impressed itself deeply on my mind—and it may be construed into a reason why every thing—and all other languages—must give way to the English language. That language, thus carries with it something of authority, by means of its operation in the laws and the regulation of the laws; and unless some special provision is made for the education of the descendants of the German people in the German language, all those who may be in any respect concerned in the administration of the laws, will be apt to believe that they have discharged the whole duty required of them by the constitution, so soon as they have seen the school law carried into operation in the English language. To my mind, this is a serious difficulty.\textsuperscript{228}

Delegate Barnitz's comments reflect his awareness of the relationship between law and the preservation of languages: the operation of laws written in English furthered the dominance and authority of the English language. In the same way, legal authorization for education in German could help preserve that language and culture.

Some delegates felt that the best course would be to provide for public education while making no reference to language. Delegate Heister, for example, suggested that there should be no constitutional provision respecting the language or languages of public instruction. He thought that the legislature should encourage education in the English language to the fullest extent. Moreover, he believed that the presence of differ-

\textsuperscript{226} Id.
\textsuperscript{227} Id. at 224.
\textsuperscript{228} Id. at 277-78.
ent languages, German and English in Pennsylvania, French and English in Louisiana, was divisive and that languages other than English should disappear, to increase the feeling of unity and happiness among citizens. At the same time, however, he would do nothing by force; I would leave it to the Germans to come in gradually, as they choose to do. The intelligent Germans of our state, are themselves satisfied of the propriety of this course, and the German schools are becoming less and less wanted every year. . . .

The German population can have instruction in the German language, if they desire to have it. They constitute about one-third of the wealth and population of this state, and the legislature, in which body they have themselves their due portion of representatives, will not undertake to exclude them from having instruction in their own language, if they desire to receive it through that medium. 229

Delegate Heister's comments are extremely important for a number of reasons. Despite his feeling that the presence of languages and cultures other than the English were divisive, Heister, like Benjamin Rush, saw the preservation of German, and the acquisition of English, as matters to be left to individual decisionmaking, not governmental coercion. 230 Heister also recognized that the legal recognition of languages other than English was a matter of political power. As long as German-speakers had representation in the legislature and sufficient political clout, their interests in their primary language, and in other issues, would be protected.

The debate is noteworthy because it resembles current debates over similar issues. First, some legislators saw the mere presence and prominence of the German language as inherently divisive, despite the apparent absence of real political divisions along ethnic lines. Second, some legislators labelled as "intelligent" only those Germans who did not desire legal recognition for the German language and who may not have wished to preserve their German language. Conversely, Germans wishing to maintain their language were "ignorant," despite recognition that Germans were among the most educated and accomplished Pennsylvanians. This is an example of hierarchy imposed upon language difference: seeking knowledge of English, acculturating to the core culture is "intelligence"; knowledge of German is seen as no knowledge, ignorance.

At least one delegate valued the preservation of German culture and language through education in German. Another

229. Id. at 281.
230. Id.
recognized that language choice was a matter for individual choice, not coercion. We must recognize, however, the coercion, or incentives, inherent in the dominance of English as the language of most Americans.

Ultimately, the state passed a constitutional amendment providing for public education but with no provision regarding the language of instruction. During the legislative session of 1837, however, the legislature enacted a law permitting the founding of German schools on an equal basis with English schools.231 Thus education in two languages had state support. In subsequent years, due to the political clout of the German-speaking population, the Pennsylvania legislature gave legal recognition to the German language in various statutes.

In 1843, the legislature created "permanently the office of State Printer."232 There were actually two State Printers, "one to do the English, and one to do the German printing of the commonwealth."233 They were to print "the laws, journals, reports, messages, bills and other documents," in short virtually all the publications of government.234 That year, the legislature authorized the printing of 500 copies of the journals of the General Assembly and 250 copies of the laws in German.235 In 1844, both houses of the General Assembly resolved to appoint one German translator for each house to translate official documents.236 In 1847, the legislature ordered the printing of many reports of executive departments in German.237 The printing of official versions of the Pennsylvania laws in German ended in 1850, when the legislature repealed its prior acts authorizing the printing of the laws and legislative journals in German. The legislature still authorized, however, the printing of executive documents and occasional legislative documents in German.238 Certain executive documents were printed in German in 1856239 and, as late as 1889, the Pennsylvania House of Representatives authorized printing 2000 copies of the Governor's message in German.240

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231. See Leibowitz, supra note 210, at 179.
233. Id.
234. Id. § 3.
B. CALIFORNIA

The Spanish language was introduced into Mexico in 1519, when explorers and conquerors from Spain arrived and claimed Mexico for the Spanish crown. Over the next three centuries, Spanish-speaking people migrated northward into the area which later became Arizona, California, New Mexico, and Texas. By 1790, approximately 23,000 Spanish-speaking persons populated these areas.

The American annexation and conquest of California began in 1846. By January, 1847, the United States had destroyed the native government of California and had severed California from Mexican control. California and other Spanish-speaking areas became territories of the United States in 1848 under the Treaty of Guadalupe Hidalgo. The treaty provided that Mexican citizens who remained within the newly ceded territories for a year after ratification would become United States citizens. The treaty also stated that Mexicans residing in these areas would receive some constitutional and legal protections enjoyed by American citizens.

After brief rule under two American military governors, a constitutional convention was held in 1849 in Monterrey, which ultimately led to statehood. Within a short time democracy unleashed the hostility of the new English-speaking immigrants against the native Spanish-speaking Californios. The first California State Constitution, however, was drafted in a “con-

241. CHARLES GIBSON, SPAIN IN AMERICA 25 (1966); A. CURTIS WILGUS, THE DEVELOPMENT OF HISPANIC AMERICA 89 (1941). Spanish was the first European language introduced into America. The first English-speaking colony was not settled until 1607. See JACK P. GREENE, SETTLEMENTS TO SOCIETY: 1584-1763, at 1-2 (1975) (sketching a brief history of English colonization).
242. Leibowitz, supra note 210, at 199.
243. Id. at 99 (citing HERSCHEL MANUEL, SPANISH-SPEAKING CHILDREN OF THE SOUTHWEST 4 (1965)).
246. See Treaty of Guadalupe Hidalgo, supra note 245, art. VIII, 9 Stat. at 929 (granting Mexican citizens a choice of citizenship, but providing a default choice of United States citizenship in the event they did not make their election in one year).
247. See id. art. IX, 9 Stat. at 930.
248. PITT, supra note 244, at 42.
Eight of the forty-eight delegates to the California Constitutional Convention were Spanish-speaking Californios. An official translator was present.

The Californios arrived at the convention anxious to protect their civil rights and land titles, which were at risk under the Treaty of Guadalupe Hidalgo and because of the influx of English-speaking Anglo gold-rushers. The Californios shaped several features of the 1849 constitution, including provisions on voting qualifications, taxation, boundaries, and publication of the laws. All resolutions and articles the convention considered were translated prior to any vote. The constitution was published in both Spanish and English.

One provision of California’s first constitution, adopted unanimously by the convention, provided for official recognition of Spanish and English through the promulgation of the laws in both languages: “All laws, decrees, regulations, and provisions, which from their nature require publication, shall be published in English and Spanish.” The United States Congress approved this constitution, containing this provision, when it admitted California as a state on September 9, 1850.

Implementing the constitutional provision, the California legislature provided for a state translator.

In 1850, the legislature enacted a statute that authorized the dissemination of statutes, legislative journals, supreme court decisions, and other government documents in Spanish and English. During that session, the legislature ordered the printing of 1050 English copies and 350 Spanish copies of all laws passed that year. During the 1851 and 1852 legislative sessions:

249. Leibowitz, supra note 210, at 200.
250. Pitt, supra note 244, at 43.
251. Id. at 44-48.
255. Pitt, supra note 244, at 46.
257. Act for the Admission of California, 9 Stat. 452, 452-53 (1850) (approved Sept. 9, 1850).
260. Id.
sessions, the legislature authorized the printing of the California laws and other documents in English and Spanish. The 1852 legislature authorized 700 English copies and 300 Spanish copies of laws passed that session. Some of the Spanish editions of the California laws were abridged versions of the English editions. A series of legislative enactments during the period from 1852 to 1863 established procedures for the translation of the laws into Spanish, including the selection of laws to be translated, the selection of a qualified translator, the administration of an oath promising faithful and correct translation, and a bidding procedure for choosing the least expensive translator.

At the same time, there was much ambivalence toward the Californios and their Spanish language. The 1855 legislature, gripped by “Hispanophobia,” among other factors, defied the California constitution and refused to provide for a Spanish translation of the laws. By the 1870s, the political climate had changed with the demographics of the state, which had experienced a huge influx of English speakers during the years of the gold rush, 1849 and beyond.

In 1848, approximately half of California’s 15,000 residents were of Mexican descent and presumably Spanish-speaking. In the wake of the gold rush, in 1849 alone the population grew by about 100,000, including 80,000 new Anglo English speakers. Initially, the Californios participated in the gold rush. They were, however, met with tremendous hostility from the new Yankee immigrants who, ironically, labelled the Californios “foreigners” in their own land. With a new political majority of English speakers, and a diminishing minority of Spanish speakers, the perceived necessity for and the perceived utility of laws published in Spanish deteriorated gradually.

263. Fedynskyj, supra note 206, at 473.
265. Pitt, supra note 244, at 198.
266. Leibowitz, supra note 210, at 200.
267. Pitt, supra note 244, at 52.
268. Id. at 50-51.
269. See generally Leibowitz, supra note 210, at 200 (explaining the decline of Spanish education in the Southwest).
The Californios eventually lost the political clout that they had had during the constitutional convention of 1849 because of several factors: the hostility and violence of the Anglo immigrants to California; the administration of property laws that non-English speakers did not understand; and the sudden transformation of the Californios into a political minority.\textsuperscript{270} The last official edition of the California laws in Spanish appeared in 1878.\textsuperscript{271}

The next year, the California Constitution of 1879 prohibited the publication of the laws in any language other than English: the laws and proceedings of government were to be published in “no other than the English language.”\textsuperscript{272} Despite this change in the constitution, certain regions, such as southern California, remained Spanish-speaking during and after the 1870s.\textsuperscript{273} In 1894, an amendment to the California Constitution provided that the laws were to be published in “no other than the English language” and imposed an English literacy requirement for eligibility to vote.\textsuperscript{274} Subsequently, in 1897, the legislature repealed laws authorizing publication of the California laws in Spanish.\textsuperscript{275} In 1986, nearly 100 years later, California voters, by referendum, amended the state constitution to make English the official language of the state.\textsuperscript{276}

C. \textsc{New Mexico}

The immigration of English-speakers to New Mexico had “an entirely different character, in quality and quantity, from the immigration that so quickly engulfed the Spanish-speaking in . . . California.”\textsuperscript{277} This difference accounts, perhaps, for the greater longevity of official bilingualism in New Mexico and for the greater acceptance and recognition of New Mexico’s Span-

\textsuperscript{270} See \textsc{Pitt}, supra note 244, at 89-91, 278-84 (discussing “Yankee” and Hispanic perceptions of the decline of the Californios); \textsc{Leibowitz, supra} note 210, at 201.

\textsuperscript{271} \textsc{Fedynskyj, supra} note 206, at 473.

\textsuperscript{272} \textsc{Cal. Const.}, art. IV, § 24 (repealed 1966).

\textsuperscript{273} \textsc{Leibowitz, supra} note 210, at 201.

\textsuperscript{274} \textsc{Cal. Const.}, art. II, § 1 (1894) (repealed 1972).

\textsuperscript{275} Act of Mar. 9, 1897, ch. 96, 1897 Cal. Stat. 99 (repealing Cal. Pol. Code § 415 (1873)).

\textsuperscript{276} \textsc{Cal. Const.}, art. III, § 6.

\textsuperscript{277} \textsc{Carey McWilliams}, \textsc{North From Mexico} 116 (1968), quoted in \textsc{Leibowitz, supra} note 210, at 202. For other discussions of the history of New Mexico, see \textsc{George Isidore Sanchez}, \textsc{Forgotten People: A Study of New Mexicans} (1940); \textsc{Nancie L. Solien Gonzalez}, \textsc{The Spanish-Americans of New Mexico: A Heritage of Pride} (1969).
ish and English linguistic traditions that continues today.\textsuperscript{278} Prior to 1846, there were only about 100 English speaking settlers in New Mexico.\textsuperscript{279} It took many more years for English speakers to become a politically dominant group.

The organic laws of the territory of New Mexico were published in a bilingual, Spanish-and-English edition on October 7, 1846.\textsuperscript{280} The first page announces its title, “Leyes del Territorio de Nuevo Mejico,” “Laws of the Territory of New Mexico,” in both languages.\textsuperscript{281} Each subsequent page of this edition contains the laws printed in Spanish on the left side of the page and in English on the right,\textsuperscript{282} a reflection of linguistic and cultural parity. In December, 1847, the first laws enacted by the territorial general assembly were published in both Spanish and English, with the Spanish version on one page and the English version on the opposite page of the same volumes.\textsuperscript{283} This manner of publishing the laws continued until 1867, after which separate Spanish and English editions of the New Mexico laws were usually published.\textsuperscript{284} The laws of the New Mexico territory enacted during the session held in June, 1851, were published in Spanish and English as a United States Senate document, the only session laws to be published as a federal document.\textsuperscript{285}

The laws enacted during the 1868-69 session were translated into English from the original enactment in Spanish.\textsuperscript{286} This was typical at the time. Until 1870, the laws were usually enacted in Spanish and then translated into English. After 1870, the opposite order became prevalent, with enactment in

\textsuperscript{278} For another discussion of the history and legal treatment of Spanish in New Mexico, see BARON, supra note 18, at 94-104.
\textsuperscript{279} Leibowitz, supra note 210, at 202.
\textsuperscript{280} 1846 N.M. Laws 1. The author examined copies of these volumes available on microfiche.
\textsuperscript{281} Id.
\textsuperscript{282} See, e.g., id. at 2.
\textsuperscript{283} Fedynskyj, supra note 206, at 471.
\textsuperscript{284} Id.; see also 1869 N.M. Laws 17 (apparently ending practice of printing Spanish and English versions of the laws on alternate pages of the same volume). The laws of 1870, however, were printed using alternating pages in Spanish and English. See 1870 N.M. Laws 18-19.
\textsuperscript{285} See Fedynskyj, supra note 206, at 471 (citing S. Misc. Doc. No. 14, 32d Cong., 1st Sess. 1, 1-5 (1852) (federal printing, in Spanish, of New Mexico law creating official Spanish-English translator); H.R. Misc. Doc. No. 4, 32d Cong., 1st Sess. (1852)).
\textsuperscript{286} See, e.g., Act of Dec. 30, 1868, ch. 1, 1869 N.M. Laws 17, 18 (stating that the text was “[t]ranslated from the original Spanish”).
English followed by translation into Spanish. 287

Between 1870 and 1907, the legislature routinely authorized the publication of "bills, rules, reports" and other documents in Spanish. 288 In 1874, the legislature passed an act requiring that "in the construction of the statutes of this Territory... the language in which the said law was originally passed, shall govern, whether it be in Spanish or English." 289 The legislature apparently concluded that statutory meaning was rendered more faithfully in the original language of enactment, rather than the language of translation. 290

New Mexico's bilingual identity was also recognized in its educational system. In 1909, the state legislature created the "New Mexico Spanish-American Normal School." 291 The school was deemed necessary because "[o]ver 400 country public schools in New Mexico are composed principally of scholars whose native language is Spanish, and who consequently can only be taught English and other studies effectively by teachers acquainted with the Spanish language." 292 The state created the school to train Spanish-speaking teachers in the art of instructing Spanish-speaking students to speak English. 293

Despite repeated attempts at statehood beginning in 1850, New Mexico did not become a state until 1912, when a majority of its population was English-speaking for the first time. 294 The reason for this delay was Congress's unwillingness to grant

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287. Fedynskyj, supra note 206, at 471.
290. Cf. Douglass v. Lewis, 9 P. 377, 379 (N.M. 1886) (noting the difficulties of construing a statute passed in Spanish and interpreted in English), cited in Fedynskyj, supra note 206, at 475.
292. id.
293. Id.
294. Leibowitz, supra note 210, at 203.
statehood to a predominantly Spanish-speaking territory.295 Congress also expressed its bias in favor of English in the New Mexico Enabling Act, which made New Mexico a state. The Enabling Act required that the public "schools shall always be conducted in English" and that "ability to read, write, speak and understand the English language without an interpreter shall be a necessary qualification for all state officers and members of the state legislature."296 Congress, bowing to pressure

295. Kloss, supra note 61, at 128. As of 1902, New Mexico had petitioned for statehood for approximately 50 years. Citizens of New Mexico complained about the federal government's persistent denial of statehood in a petition adopted by a convention held in Albuquerque on October 15, 1901. They declared they were entitled to statehood "by virtue of the principles enunciated in the Declaration of Independence," much of the language of which they adopted in their petition. 35 CONG. REC. 5143-44 (1902) (quoting the petition).

The principal objection to their admission appears to have been prejudice against their Spanish language and Spanish and Mexican heritage. Representative Knox, an advocate for statehood, described the arguments of opponents: "There has been a great deal of talk about those people—about their being Spaniards and Mexicans and 'greasers'—people who do not come up to the American standard, who have lain without progress for a great many years." Id. at 5139; see also 45 CONG. REC. 707 (1910) (discussing concerns about the Spanish language and language diversity in the United States). Knox refuted these arguments, noting that residents of New Mexico had excellent schools:

I have heard it said by members of the House that they have schools in which Spanish is the language taught, and that that is decidedly objectionable. Generally speaking, that statement is not correct. They have a very excellent school system. It is the district school system of New England and the rest of the United States.

35 CONG. REC. 5139 (1902).

Three years later, Senator Teller would respond to similar concerns about the Spanish language of the territory's residents:

I confess to some irritation and some vexation when I am told that among the reasons why you should deny citizenship to these people is the fact that they still speak the Spanish tongue and have to have an interpreter in court. I do not wonder that the Spaniards of New Mexico speak the Spanish tongue, and I should have less respect for them if they did not.

They come of a great race. They can go back not long since when they were the dominating power of the world; and if you want to go back into the history of individuals, you can find among the people of that race men who were as thoroughly imbued with the ideas that were crystallized in our Declaration of Independence as you can find anywhere in the world. You can go back hundreds of years and find those men proclaiming great political truths that sometimes we think are of modern origin and with respect to which we are entitled to claim credit as the promoters and discoverers. The history of her statesmen and her warriors gives to the people of that country a right to be proud of their race and of the people from whom they come.

39 CONG. REC. 1687 (1905).

from Hispanic citizens of the state, withdrew the English literacy requirement for state elective offices in the next year.\(^{297}\)

New Mexico adopted a constitution in 1911. Perhaps in response to the segregation of black children in public schools, the constitution prohibited such treatment for Hispanic children:

Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the State, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the State, and the legislature shall provide penalties for the violation of this section.\(^{298}\)

The constitution required official bilingualism, stating that for twenty years after its adoption, all laws "shall be published in both the English and Spanish languages."\(^{299}\) Two legislative acts extended this period by twenty years, until early in 1953.\(^{300}\)

Beginning with the organic laws of 1846 and continuing for over 100 years, the laws of New Mexico were published in official Spanish and English editions. State-sponsored official bilingualism, therefore, enjoyed unusual longevity in New Mexico. More recently, in 1989 New Mexico officially endorsed the preservation of its bilingual linguistic heritage:

[The New Mexico legislature] reaffirms its advocacy of the teaching of other languages in the United States and its belief that the position of English is not threatened. Proficiency on the part of our citizens in more than one language is to the economic and cultural benefit of our state and the nation. . . . Proficiency in English plus other languages should be encouraged throughout the state.\(^{301}\)

D. LOUISIANA

After approximately 100 years of French rule and forty years of Spanish rule, the territory containing Louisiana became a United States territory under a treaty dated October 21, 1803.\(^{302}\) This treaty guaranteed to all residents of the territory enjoyment of "all the rights, advantages, and immunities, of cit-


\(^{298}\) N.M. CONST. art. XII, § 10.

\(^{299}\) Id. art. XX, § 12. An edition of annotated statutes appeared in Spanish only in 1915. Fedynskyj, supra note 206, at 471.

\(^{300}\) Act of Apr. 9, 1943, ch. 31, 1943 N.M. Laws 34; Act of Mar. 17, 1931, ch. 113, 1931 N.M. Laws 201.


The first laws governing the territories of Louisiana and Orleans, in the Legislative Act of 1804, were published in both French and English on opposite pages of the same volume.304

Since the eighteenth century, Louisiana has had a sizeable French-speaking population.305 The first constitution of the state of Louisiana, ratified in 1812, required that "[a]ll laws that may be passed by the Legislature, and the public records of this State, and the judicial and legislative written proceedings of the same, . . . be promulgated, preserved and conducted in the language in which the constitution of the United States is written."306 The Louisiana Constitutions of 1845, 1852, and 1864 contain similar provisions.307 Although these provisions required publication of the Louisiana laws in English, publication in English was not intended to be exclusive. Other provisions of the constitutions of 1845 and 1852 required promulgation of the laws in French and English: "The constitution and laws of this State shall be promulgated in the English and French languages."308 Accordingly, between 1804 and 1867, and later in 1881, the laws were published in both English and French.309

During the first half of the nineteenth century, the political and cultural influence of the French-speaking population reached its height. French literature and the French-language press flourished.310 The influence of the French-speaking population waned in 1864, however, with the defeat of the South and the ascendancy of the Republican party, which included few of the French.311 An anti-French feeling characterized the period between 1864 and 1879. This animosity manifested itself in lessened constitutional protection for the French language.312 In this instance, language was used as a vehicle for expressing hostility against people of French ethnicity.

303. Id. art. III, 8 Stat. at 202.
304. Fedynskyj, supra note 206, at 473.
305. See KLOSS, supra note 61, at 107-08 (discussing early Louisiana history). For another discussion of bilingualism in Louisiana, see BARON, supra note 18, at 83-87.
306. LA. CONST. of 1812, art. VI, § 15.
307. See LA. CONST. of 1864, tit. VII, art. 103; LA. CONST. of 1852, tit. VI, art. 100.; LA. CONST. of 1845, tit. VI, art. 103.
308. See LA. CONST. of 1852, tit. VI, art. 129; LA. CONST. of 1845, tit. VI, art. 132.
309. Fedynskyj, supra note 206, at 473.
310. KLOSS, supra note 61, at 108.
311. Id. at 109, 113. Indeed, the French-speaking population had supported Louisiana's secession from the Union in 1861. Id. at 109.
312. Id. at 114.
The Louisiana Constitution of 1864, reflecting this anti-French feeling, omitted the provisions requiring publication of the laws in French.\(^{313}\) This version of the constitution provided, for the first time,\(^{314}\) that instruction “in the common schools shall be conducted in the English language.”\(^{315}\) The constitution still recognized, however, that citizens speaking English, French, and German would be voting to ratify the Louisiana Constitution. The 1864 constitution provided that, for the period from adjournment of the constitutional convention until ratification, “[t]his constitution shall be published in three papers . . . whereof two shall publish the same in English and French, and one in German.”\(^{316}\) Again reflecting the diminished influence of the French, the state constitution of 1868 became more pro-English, requiring publication of the laws in English: “The laws, public records, and the judicial and legislative proceedings of the State shall be promulgated and preserved in the English language; and no laws shall require judicial process to be issued in any other than the English language.”\(^{317}\)

Ultimately, the French regained some influence with the ascendancy of the Democratic party.\(^{318}\) By 1879, the state constitution authorized, again, publication of the laws in French:

The laws, public records and the judicial and legislative written proceedings of the State shall be promulgated, preserved, and conducted in the English language; but the General Assembly may provide for the publication of the laws in the French language, and prescribe that judicial advertisements in certain designated cities and parishes shall also be made in that language.\(^{319}\)

The 1879 constitution also reintroduced the possibility of primary school instruction in French, as well as English:

The general exercises in the public schools shall be conducted in the English language and the elementary branches taught therein; provided, that these elementary branches may be also taught in the French language in those parishes in the State or localities in said parishes where the French language predominates, if no additional

313. Id. at 113.
314. Id.
315. LA. CONST. of 1864, tit. XI, art. 142.
316. Id. tit. XIV, art. 155. Twenty of the 90 members of the 1864 constitutional convention had German surnames and the convention nearly decided to publish its records in German as well as French. Kloss, supra note 61, at 113.
317. LA. CONST. of 1868, tit. VI, art. 109.
319. LA. CONST. of 1879, art. 154. The Louisiana Constitution of 1913 contained a similar provision. See LA. CONST. of 1913, art. 165.
Despite this renewed recognition of the French language, by this time it was clear that English was the dominant language of the state. The French-speaking population would never regain its pre-Civil War dominance. Hence, despite the constitutional authorization for the publication of laws in both French and English, after 1881 there was, apparently, no French edition of the laws. The constitution of 1921 omitted all references to the French language and required public instruction to be in English. This constitution remained in effect until 1974.

The Louisiana Constitution of 1975, while not mentioning the French language, asserts the right of residents "to preserve, foster and promote their respective historic, linguistic and cultural origins." This provision was intended to preserve the French Acadian culture and the French language of Louisiana.

The legal histories of these states reveal that they gave official recognition to languages other than English to a far greater extent than did the federal government. America's cultural pluralism was thus more openly acknowledged in the law of these states during the nineteenth century than today,

320. LA. CONST. of 1879, art. 226.
321. See KLOSS, supra note 61, at 114.
322. Fedynskyj, supra note 206, at 473-74.
323. KLOSS, supra note 61, at 113.
324. LA. CONST. of 1921, art. 12, § 12.
325. LA. CONST. art. XII, § 4 (1975), quoted in KLOSS, supra note 61, at 114.
326. See Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 LA. L. REV. 647, 682 (1983) (asserting that "[p]roponents of the section were primarily Francophones concerned with the protection of the French Acadian culture").
327. The earlier acceptance of official bilingualism in several states, contrasted with the currently increasing acceptance in the states of official English laws, raises an interesting issue about the proper locus of regulation of language rights. History demonstrates that language has been principally regulated by states under state constitutional and statutory law, with few exceptions, for example, language rights regulated under the relatively recent Federal Voting Rights Act. Restrictions on language, however, have been struck down by the Supreme Court as violations of substantive due process in Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) and Meyer v. Nebraska, 262 U.S. 390 (1923).

There is a distinction between official bilingualism or multilingualism, which arguably promotes liberty by enhancing the status of more than one language, and official English, which creates inequality by promoting only the language of the dominant culture. The state-sponsored inequality created by official English laws should be subject to federal judicial review under the Equal Protection Clause. See discussion infra part VIII.B.
when increasing numbers of states are adopting official English laws. At times when Americans who spoke other languages were politically powerful and numerous, state legislatures openly gave official status to their languages. Although some state legislators and constitution-makers expressed the common fears that different languages would lead to division and disloyalty, these fears did not predominate in several states during this period of our history. Indeed, legislatures in Pennsylvania and Louisiana provided for single-language public education in German and French, respectively. The legislative recognition of more than one official language by several states belies the notion that national unity somehow depends on linguistic homogeneity.

Legal history also sheds light on the use of languages other than English for public education. Some proponents of official English assert that demands by Hispanics for bilingual services, and particularly for bilingual education, are unprecedented. In the 1984 Senate hearings on the subject of an official English constitutional amendment, Senator Huddleston quoted Theodore White in his testimony:

> Some Hispanics have, however, made a demand never voiced by immigrants before: that the United States in effect officially recognize itself as a bilingual, national formation. They demand that the United States become a bilingual country, with all children entitled to be taught in the language of their heritage, at public expense.328

Legal history demonstrates that Senator Huddleston and Theodore White are wrong. First, the demand for bilingual education dates back to the inception of our nation. In 1787, the German college at Lancaster was established to provide bilingual education in German and in English. In 1837, the Pennsylvania legislature authorized the founding of German-language schools on an equal basis with English-language schools, both at public expense. Louisiana, prior to 1864 and after 1879, provided for public education in English and French. Many schools of this time, and earlier, were monolingual in languages other than English. Whatever the merits of the extensive current debates about bilingual education, it has existed as a legitimate, state-supported form of education since our nation's beginning.329

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329. For discussions on the current status of bilingual education and the Federal Bilingual Education Act, see JAMES CRAWFORD, BILINGUAL EDUCATION.
Therefore the statement that this is a demand "never voiced by immigrants before" is simply false for two reasons: false, because bilingual education, at least in German and French, has been a feature of our educational landscape literally for centuries; and false, because Hispanic populations have lived within the current borders of the United States since before this nation existed. The Hispanic population is both a colonial population with ancient ties to this country, in the same sense as the English colonists, and an immigrant population, with reference to current immigrants. To refer to the entire Hispanic population, and particularly the Mexican-American population of the Southwest and California, as "immigrants" denies the longevity of the Hispanic populations of this country.

VII. NATIVISM AND THE LEGAL ENFORCEMENT OF CONFORMITY THROUGH LANGUAGE

American nativism and racism have targeted many groups throughout our history. Native Americans, African-Americans, Mexican-Americans, and Asian-Americans, among other groups, have been subjected to unequal treatment and oppression because of their differences from the majority culture.330


For discussions of American treatment of Mexicans and Mexican-Americans, see MICHAEL A. BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY 62-99 (1979) (describing the labor history of Chicanos and Mexican immigrants); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 46-57 (1964) (explaining the Bracero program's importation and exploitation of Mexican farm laborers). See generally
The following section illustrates how nativism manifested itself through legal restrictions on the language and culture of one group, the German and German-American population resident here during the time of World War I. This section also discusses the restrictive use of literacy and language requirements in our immigration laws. Finally, this section describes the official English movement and its use of language to exclude certain Americans from political participation.

A. WORLD WAR I AND THE MOVEMENT AGAINST THE GERMAN CULTURE IN AMERICA

America during 1910-1914 experienced growing nativism, as the nation groped for a sense of national unity. World War I focussed this nativism: "The struggle with Germany . . . called forth the most strenuous nationalism and the most pervasive nativism that the United States had ever known." Nativism takes aim at the ethnicity of "enemy people." Germans were deemed disloyal merely for being, acting, speaking, and reading like Germans. At the time, Germans were the largest national-origin group of immigrants in America, numbering more than 2.3 million persons. Germans had also been the largest non-English-speaking group of American colonists.

Once again, loyalty was equated with conformity to the core English-speaking culture. As during the controversy over the Alien and Sedition Acts, difference from the core culture and difference of opinion were equated with foreign influence and subversion of American identity. The wartime hysteria yielded unprecedented demands for conformity, embodied in the movement for "100 per cent Americanism." One hundred percent Americans, mostly members of the core culture, "felt sure that the nation would never be safe until


331. HIGHAM, supra note 30, at 195.
332. Id.
333. Id. at 196, 388 n.2.
334. See id. at 205.
335. Id. at 204.
every vestige of German culture had been stamped out.”336 One writer on Americanization, echoing the words of John Jay in The Federalist, wrote that “[t]he war has taught us the need of a more united people, speaking one language, thinking one tradition, and holding allegiance to one patriotism—America.”337 The wartime nativism led to the imprisonment, public flogging and lynching of Germans.338

“To Kill or Use Our German Press?” asked the Literary Digest of May 11, 1918. Killing the German press would eliminate “enemy publications” assumed to be under German influence. Others argued that “[t]he best use to which German-language papers can be put in these days is communicating American sentiments to people who can not read English.”339 Eliminating the German press went beyond rhetoric and into the law. A 1920 Oregon law prohibited publication of any foreign language newspaper unless it carried a full, conspicuous, and literal translation of all its contents.340 Such translation being prohibitively expensive, the law was intended to put the foreign-language press out of business. Advocates of such measures had forgotten “the service done by the foreign language press to the government during the war by aiding the loans and explaining the draft.”341 They would silence not only the press, but also the German voice. The governor of Iowa banned the use of any language other than English “in all schools, church services, conversations in public places or over the telephone.”342

Killing the German culture in American society also meant killing it in the schools. Many states attempted to ban the teaching of German and other foreign languages in their schools. By 1919, fifteen states had banned the teaching of foreign languages, and required English to be the sole language of instruction in primary schools, both public and private.343 Illinois made English its exclusive language of instruction because the English language is the common as well as official language of our country, and because it is essential to good citizenship that each citizen shall have or speedily acquire, as his natural tongue,

336. Id. at 208.
337. Harry Rider, Americanization, 14 AM. POL. SCI. REV. 110, 110 (1920).
338. See HIGHAM, supra note 30, at 209-10.
339. To Kill or Use Our German Press?, LITERARY DIG., May 11, 1918, at 12.
340. HIGHAM, supra note 30, at 260.
342. HIGHAM, supra note 30, at 248.
343. Id. at 260.
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the language in which the laws of the land, the decrees of the courts, and the announcements and pronouncements of its officials are made.\textsuperscript{344}

Although English was the dominant language of the country, apparently only Illinois, rather peremptorily, declared it the official language of the land.

A Nebraska statute prohibited teaching any language other than English to students who had not passed the eighth grade.\textsuperscript{345} In 1922 the Supreme Court of Nebraska affirmed the conviction of Robert Meyer, who had violated the statute by teaching biblical stories in German to a ten-year-old.\textsuperscript{346} In its opinion, the Nebraska court expressed fears of languages other than English, their inherent danger, and their perceived lack of relation to American identity:

The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become part of them, they should not be taught any other language.\textsuperscript{347}

For the Nebraska court, as for many Americans past and present, a foreign mother tongue was “foreign to the best interests of this country.” The pattern repeats itself often. The United States Supreme Court, more detached from the nativism of the time, reversed Meyer’s conviction and found that the statute violated substantive due process rights under the Fourteenth Amendment.\textsuperscript{348} The Court wrote that “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”\textsuperscript{349}

The war against Germany produced an unprecedented fear of German-American ethnicity, resulting in intensified de-
mands for conformity with the core culture and the concomitant dismemberment of the German culture and language in America. A wartime crisis spawned intense social and legal suppression of ethnic traits associated with the enemy. America attempted to define her true identity as that of her core culture. The perception of foreignness, i.e., difference from that core culture, was once again equated with disloyalty and subversion. At roughly this same time, nativists sought to reinforce the core American culture through the immigration and naturalization laws.

B. Official Language Policy Enacted Through the Immigration and Naturalization Laws

Despite the absence of federal laws declaring English to be the official language of our country, some federal laws do, in effect, produce this result. Our current federal immigration and naturalization laws contain a requirement of literacy in English for naturalized citizenship, and a literacy requirement for admission to the United States. In addition, the Immigration Reform and Control Act of 1986 required aliens newly legalized under its amnesty provision to demonstrate "minimal understanding of ordinary English" in order to become permanent resident aliens.

The English-literacy requirement for citizenship is of tremendous symbolic importance. It is an important expression of federal policy in favor of English. It is through our naturalization laws that, in clearest form, the nation spells out the criteria that must be met by those who would join the American nation.

English literacy has not, however, always been a requirement for citizenship. Nor has literacy always been a requirement for initial admission to the nation. The evolution of the English-language literacy requirement further demonstrates that nativism finds expression through language restrictions.

1. Literacy Tests for Admission to the United States

A strong popular movement favoring coerced assimilation occurred for the first time near the beginning of the twentieth

Before this time, until around 1880, immigration to the United States had been open and unrestricted. Most people assumed that American society would assimilate new immigrants. Indeed, because most of the immigrants until this time were from northwestern Europe, and especially from Great Britain, Germany, and Scandinavia, traditional sources of the American population, their racial and cultural characteristics matched those of the existing population relatively well and they were able to assimilate with relatively little cultural friction.

By 1890, immigrants from these countries began to be outnumbered by immigrants from the countries of southern and eastern Europe: Italy, Poland, and the Austro-Hungarian empire. These new immigrants brought with them their distinctive cultural traits. In response to these new, culturally different immigrants, a strong popular movement, fueled by American nativism, developed in favor of restrictions on immigration to the United States.

The first goal of proponents of restricted immigration was a literacy test for immigrants that, in theory, would exclude a large proportion of those seeking admission to the United States. The literacy test, "though ostensibly selective in theory, would prove restrictive in operation." The purpose of the literacy test was clear: to exclude people whose ethnicity differed from that of the majority. Advocates of the test hoped that the literacy test would reduce immigration by twenty-five percent.

Opponents of the new European immigration tried three times, without success, to enact restrictive legislation that included a literacy requirement in some language for admission to the United States. Such legislation passed the Congress on three occasions. It was consistently vetoed by successive presidents because it was such a departure from prior, liberal immigration policy.

353. HIGHAM, supra note 30, at 234.
354. ROBERT DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 2-3 (1957). I do not include Africans within the term "immigrants" because they were brought here against their will in bondage, rather than voluntarily.
355. Id. at 3.
356. Id.
357. Id.
358. Id. at 4.
359. Id. at 5; BARON, supra note 18, at 57.
360. See HIGHAM, supra note 30, at 186-93 (describing non-restrictive attitude toward immigration until World War I).
President Taft's veto of the immigration legislation including the literacy test on February 14, 1913 is particularly instructive. Taft refused to sign the legislation because of the literacy test and its potentially restrictive effects on immigration. Taft relied on the objections of his Secretary of Commerce, Charles Nagel, in vetoing the legislation.\footnote{361. \textit{See Taft's Veto of Literacy Test for Immigrants (Feb. 14, 1913), reprinted in} 2 \textsc{Henry S. Commager, Documents of American History} \textit{77, 77-78} (7th ed. 1963).}

Nagel objected to the legislation for several reasons. First, proponents of the literacy test, who had originally justified the test as a measure for selecting only literate immigrants, had changed positions and now attempted to defend it as "a practical measure to exclude a large proportion of immigrants from certain countries."\footnote{362. \textit{Letter from Charles Nagel to William Howard Taft (1913), in} 2 \textsc{Commager, supra note 361, at} 77, 77.} Nagel objected to the change in justifications because "[i]f the measure proposes to reach its result by indirect direction, and is defended purely upon the ground of practical policy, the final purpose being to reduce the quantity of cheap labor in this country."\footnote{363. \textit{Id.} (emphasis added).} Nagel concluded that the test was "based upon a fallacy in undertaking to apply a test which is not calculated to reach the truth and to find relief from a danger which really does not exist."\footnote{364. \textit{Id.}} Taft's veto of the literacy test, therefore, rejected the use of a literacy test as a proxy for the goal of excluding certain "undesirable" immigrants from southern Italy, Poland, Mexico, and Greece because of their national origin. Thus language, in the form of a literacy test, was proposed and rejected as a proxy for exclusion on the basis of national origin.

President Wilson also vetoed immigration legislation containing a literacy test.\footnote{365. \textit{Wilson's Veto of Literacy Test for Immigrants (Jan. 28, 1915), reprinted in} 2 \textsc{Commager, supra note 361, at} 101.} For Wilson, the restrictive legislation embodied "a radical departure from the traditional and long established policy of this country," a policy based on relatively uninhibited access to the freedoms available in this country.\footnote{366. \textit{Id.}} Like Taft, Wilson objected to the exclusionary effects of the literacy test, which were contrary to our established immigration policy: "In this bill it is proposed to turn away from tests of character and of quality and impose tests which exclude and..."
restrict."  

Congress, however, enacted the provision requiring a literacy test over President Wilson's veto in 1917, on the eve of America's entry into World War I. The literacy test excluded "[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish." Increasing literacy rates in southern Europe and the postwar migration of educated Europeans, however, made a simple literacy test ineffective as an exclusionary device.

When this failure became apparent, more effective restrictive legislation passed establishing numerical quotas for immigrants. The prevailing idea among advocates of quota restrictions was that national unity depended on racial "homogeneity," which appeared to mean preservation of the existing racial character of the country. Thus, one congressman argued that "[t]he trouble grows out of a country composed of intermingled and mongrelized people. The stability of a country depends upon the homogeneity of population." Another congressman coined the slogan, "one race, one country, one destiny." As the advocates of restriction saw it, the survival of constitutional democracy depended on maintenance of the Nordic race: "If, therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained."

These comments illustrate the theme, repeated throughout our history, that our national identity, unity, and loyalty to our government depend on uniformity—sometimes racial, some-

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367. Id. at 102.
371. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 5 (repealed 1952); Immigration Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952); see Higham, supra note 30, at 308-11; Hutchinson, supra note 368, at 468-70.
374. Id. at 5868 (statement of Rep. Hershey), quoted in Divine, supra note 354, at 15.
times linguistic. "Foreign influences," persons whose ethnicity differs from that of the majority, are perceived as a threat to the nation. America's supposedly uniform ethnicity had to be created and preserved through the law. In the case of the immigration laws, the idea was that national unity depended on racial purity and uniformity, with existing American races superior to any others seeking entry. As is discussed infra, an identical theme underlies the official English movement's claim that national unity depends on linguistic uniformity or purity. 376

The controversy over the inclusion of a literacy test for admission to the United States illustrates two of the principal themes of this article. First, the repeated exchanges between several presidents and several Congresses illustrate the tension between the perception of America that would accommodate pluralism and a view of America based on a need to restrict difference and encourage conformity. These exchanges illustrate the dialectic between plurality and conformism. The repeated presidential vetoes of legislation including the literacy test stemmed from the inconsistency between a literacy test that would exclude immigrants and America's tradition of providing haven for freedom-seeking peoples. The presidential vetoes drew from the tradition of liberty that includes freedom for ethnically different peoples within our shores. By reaffirming the view of America as a land of opportunity for different peoples, these presidents reaffirmed the view of America as a pluralistic society. Congress, in contrast, responded to a strong popular movement supporting coerced assimilation, or increased conformity to some image of the desirable American. 377 During this time period, pressures for conformity within American society ran strong. 378

The controversy over the literacy tests also illustrates the use of language as a proxy for the exclusion of immigrants on the basis of national origin. The heart of Secretary Nagel's and President Taft's objections to the literacy test was its use as an indirect, disguised device for exclusion because of national origin. When the literacy test ultimately prevailed despite several vetoes, Congress had established a precedent for the use of language ability as a proxy for national origin.

376. See discussion infra part VII.C.3.
377. HIGHAM, supra note 30, at 235.
378. This was the time of the "crusade for Americanization" and the movement for 100% Americanization. See id. at 234-63.
2. The Development of Language Requirements for Citizenship

The first statutory requirement of English ability for naturalized citizenship appeared in 1906. The rationale for the statute was that a requirement of ability to speak English would improve the "quality" of naturalized citizens. The Commission on Naturalization of 1905 expressed the prevailing view: "[T]he proposition is incontrovertible that no man is a desirable citizen of the United States who does not know the English language."379

The initial requirement was that an applicant be able to speak English.380 Some courts, however, added a gloss requiring literacy to the statutory provision. For example, in Petition of Katz,381 the federal district court found that a successful Polish immigrant, unable to read English, could not fulfill the statutory requirement of attachment "to the principles of the Constitution of the United States."382 The Nationality Act of 1940 also contained the requirement that an applicant for citizenship speak English. Section 304 of the Act stated: "No person . . . shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot speak the English language."383

In 1950, at the height of the national hysteria over the threat of communism, Congress stiffened the language requirements for naturalization. The Subversive Activities Control Act of 1950384 amended section 304 to demand full literacy in English:

No person . . . shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate
(1) an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language . . . . [and]
(2) a knowledge and understanding of the fundamentals of the his-

379. COMMISSION ON NATURALIZATION, REPORT TO THE PRESIDENT (Nov. 8, 1905), reprinted in H.R. Doc. No. 46, 59th Cong., 1st. Sess. 11 (1905).
380. Section 8 of the Naturalization Act of 1906 provided that "no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language." Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599.
381. 21 F.2d 867 (E.D. Mich. 1927).
382. Id. at 868. But cf. In re Rodriguez, 81 F. 337, 353 (W.D. Tex. 1897) (holding that illiteracy in English and Spanish was not a barrier to citizenship for a law abiding person of Mexican descent).
384. Ch. 1024, 64 Stat. 1018 (repealed 1952).
tory, and of the principles and form of government, of the United
States. These provisions of the naturalization statute remain essen-
tially the same today.

The symbolic importance of an English literacy require-
ment for naturalization should not be underestimated. It is in
the naturalization laws that the criteria for belonging to
America, for participating in its government, are most clearly
stated. As one leading commentator aptly stated it, "[a]n Eng-
lish literacy requirement . . . establishes the fact that the
United States is an English culture and that its citizens will
have to learn English in order to participate fully in it. The
very existence of a literacy test establishes the 'official' charac-
ter of the language." To date, this represents the maximum
degree to which English is officially and legally recognized as
the language of the United States.

It is revealing that increased requirements for citizenship
were enacted as part of the Subversive Activities Control legis-
alation. Once again, "foreign" characteristics, this time lack of
English literacy, were associated with disloyalty and "subver-
sive activities." Commenting on the literacy requirement, Sen-
ator McCarran, Chairman of the Senate Judiciary Committee
at the time, wrote:

As a practical matter, it is difficult to understand how a person who
has no knowledge of English could intelligently exercise the
franchise, or keep advised and informed on the political and social
problems of the community in which he lives. There are today over
one thousand foreign-language newspapers in this country; and while
many of them are undoubtedly loyal to our basic concepts, the fact is,
as revealed by Congressional investigation, that a number of these
publications are not only following the line of the Communist party,
but are actually controlled by the Communist party or its fronts.

Earlier in his article, Senator McCarran wrote that "[t]he seg-
ment of the Act dealing with immigration and naturalization is
designed to screen out subversives who seek to cloak their nefa-
rious practices with the garb of United States citizenship."

According to the testimony of then Attorney General Tom
Clark, 91.4% of the more militant members of the Communist

385. Id. § 30.
387. Arnold H. Leibowitz, English Literacy: Legal Sanction for Discrimi-
REV. 481, 511 (1951) (footnote omitted).
389. Id. at 506.
party "were of foreign stock or were married to persons of foreign stock." Furthermore, Clark testified that

[a]mong national minority groups and racial groups, the activities [for youths] are planned to accentuate nationality and racial differences, to emphasize any discrimination, to retard Americanization, and to prevent their successful assimilation into our way of living. In their activities among labor groups, Communists continually aim to create a feeling of class consciousness. Thus the pattern, while different to meet the needs of each group, is always ga[u]aged toward the same aim of pitting class against class, group against group, in an endless effort to foment strife, discontent, confusion, and disorganization.

Hence, according to Clark, accentuation of inherent ethnic differences, differences of nationality and race, formed part of the Communist conspiracy to destabilize America. Once again, Congress found foreign "stock," i.e., foreign national origin, foreign ethnicity and foreign language journals to be the locus of the Communist threat to America and its government.

It is startling that the Act established more stringent standards for education and literacy standards for American citizenship with relatively little debate or opposition. President Truman, in his message vetoing the Internal Security Act of 1950, noted that "these provisions [including the English literacy requirement], for the most part, have received little or no attention in the legislative process." Some congressmen apparently agreed that some sections of the act had not received complete consideration. Debate on the English-literacy provision appears to have been minimal. Senator McCarran phrased his argument in favor of the more stringent language requirement just as it appears above in his article. McCarran asked how Congress could "invest with citizenship an alien


391. Id. at 321.

392. Interestingly, the supporting data McCarran cites for the assertion that foreign-language newspapers were under Communist control was the testimony of a single witness who testified that two newspapers serving American Serbians and Croatians were organs for the Communist party. See McCarran, supra note 388, at 511 (citing Communist Activities Hearings, supra note 390, at 603 et seq.). It is startling that with a sample of only two out of over 1000 foreign-language newspapers, McCarran was able to discredit essentially the entire foreign-language press.


394. 96 CONG. REC. 15,629 (1950).

395. Id. at 15,297.

396. Id. at 14,183.
whose only concepts of government are formulated by what he may read in this type of press [the foreign language press, which McCarran believed to be controlled by Communists] and who has not availed himself of the opportunity to read simple English?" The intent of the English-literacy requirement, therefore, was to exclude aliens, thought to be under Communist control, from citizenship and voting. Representative Sabath opposed the amendments to the naturalization laws:

Under the provisions of this bill it will be increasingly difficult and make it nearly impossible for many honest and sincere persons to be naturalized.

... I do not look with favor on the requirement that a petitioner for naturalization be able to read and write and speak simple English. This provision will not apply to the very elements the bill attempts to reach, except to require the well-trained spy or subversive to spend a bit more time in the school where he is trained to be a subverter or agent of a foreign land.

Indeed, what alien, resourceful and well-connected enough to subvert American democracy, could fail to meet the requirements for naturalization?

The legislation, just like the Alien and Sedition Acts, and with just as broad a legislative brush, aimed to exclude aliens from citizenship to keep the "foreign influence" out of America. Supreme fear and distrust of "foreign" traits and the "foreign language" press led to legal restrictions designed to reinforce the identity of the core American culture. Nativism demands that only English-speaking Americans and the English-language press can be trusted. The English literacy requirement for citizenship remains the same today.

C. THE OFFICIAL ENGLISH MOVEMENT: THE POLITICS OF CONFORMITY OR EXCLUSION

From the panorama of the legal treatment of ethnicity and language several distinctive features of nativist movements stand out. Nativism tends to grow and flourish at times of national stress, often in response to unwelcome immigration or wartime. Nativism triggers restrictive laws aimed at persons whose ethnicity differs from that of the core culture, ostensibly to serve the goals of national unity or national security. Nativist movements, at times of national stress, seek to reinforce their narrow view of American cultural identity through the

397. Id.
398. Id. at 14,850.
law by restricting cultural traits deemed "foreign." Another feature common to these nativist movements is the desire to disenfranchise certain Americans, or to impede the naturalization of aspiring Americans, because of their difference from the core culture.

The official English movement of the 1980s is part of this ignoble tradition. Former Senator S.I. Hayakawa, acting through U.S. English, an organization he founded with Dr. John Tanton, sought an amendment to the Constitution making English the official language of the United States. Subcommittees of the Senate Judiciary Committee, in 1984, and the House Judiciary Committee, in 1988, conducted hearings on proposed official English amendments. Despite persistent efforts and publicity, proponents of official English have not yet succeeded in achieving a federal constitutional amendment.

The official English movement now appears to have a two-fold strategy: first, to obtain official English laws or constitutional amendments in the states, and, second, to have enacted a federal statute making English the official language of the federal government. Since the movement's ultimate goal is still a federal constitutional amendment, it appears that official English proponents will attempt to strengthen their position by arguing that the presence of many state laws and a possible fed-

400. For discussions on law, language policy and the official English movement, see BARON, supra note 18 (1990); LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY (James Crawford ed., 1992) (collecting articles discussing various views of, and the history behind, the official English movement); PIATT, supra note 301 (discussing development of language rights movement in the context of existing political and social institutions); 60 INT'L J. SOC. LANGUAGE (1986) (collecting articles discussing the proposed official English amendment).


402. See Senate Hearing, supra note 33.


404. The organization has, however, been quite successful in attracting adherents and money. As of 1988, it had approximately 350,000 members and an annual budget of $7 million. Califa, supra note 401, at 299.

eral statute increases or proves the necessity for a federal constitutional amendment.406

The official English movement has been quite successful in promoting state official English laws. Seventeen states now have laws declaring English to be the official language of the state.407 The movement has recently sought official English amendments to the state constitutions of Maryland, West Virginia, and Missouri.408 According to its promotional literature, U.S. English has "kicked off a nationwide campaign to encourage more states to designate English as the official language of government."409 The state official English laws have usually been enacted by direct popular votes on referenda by overwhelming margins.410 Moreover, a federal statute to codify English as the official language of the federal government was introduced in 1990 and 1991.411 These legislative efforts of U.S. English continue unabated.

Through a federal constitutional amendment or statute,

406. See id. ("We stand a better chance of passing federal legislation with every state that approves an Official English measure.").


411. See Federal English Statute Introduced, supra note 405, at 1, 5.
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the movement seeks the elimination of bilingual ballots in state and federal elections.\textsuperscript{412} To accomplish this result, they must, in effect, persuade Congress to repeal certain provisions of the Voting Rights Act that require bilingual ballots under some circumstances.\textsuperscript{413} Regarding these provisions of the Voting Rights Act, former Senator Hayakawa testified in 1984 that he “would like to have [them] thrown out altogether.”\textsuperscript{414}

According to its current literature, U.S. English has these additional goals: to “reform bilingual education through funding flexibility and accountability for effective programs”; “to promote opportunities for adults to learn English”; and “to uphold language and civic requirements for naturalization.”\textsuperscript{415} These current goals represent some fairly radical reformulations of objectives sought by the organization for years. Among their initial goals, as described in 1983, were the following: “restrict government funding for bilingual education to short-term transitional programs only”; and “control immigration so that it does not reinforce trends toward language segregation.”\textsuperscript{416}

The official English movement belongs squarely within the matrix of American nativism, in modern form. The cause of the official English movement is the immigration of people unpopular in the eyes of the majority. Its manifestations are those of earlier nativist movements: a desire, now abandoned, to restrict immigration; an appeal to national unity or, conversely, raising the familiar spectre of national disunity and the disintegration of American culture caused by new immigration; and, most important, the desire to disenfranchise certain Americans.

1. The Cause: Unwelcome Immigration

Many commentators agree that the cause of the official

\textsuperscript{412} See Califa, supra note 401, at 300-05.

\textsuperscript{413} See 42 U.S.C. § 1973b(f) (1988). This section of the Voting Rights Act mandates that “[n]o voting qualification or prerequisite to voting... shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen to vote because he is a member of a language minority group.” \textit{Id.} § 1973b(f)(2). Moreover, § 1973b(f)(4) requires a state or political subdivision subject to the prohibitions of § 1973b(a) to provide registration and voting materials in the language of the applicable minority group. \textit{See id.} § 1973b(f)(4).

\textsuperscript{414} Senate Hearing, supra note 33, at 68.


\textsuperscript{416} Wright, supra note 94, at B3, \textit{quoted in Senate Hearing, supra note 33, at 64.}
English movement is the large, and largely unwelcome, immigration of many Hispanics and Southeast Asians during recent decades.\textsuperscript{417} Since the repeal of national origin quotas in 1965,\textsuperscript{418} increasing numbers of immigrants have come from non-European countries, thus changing the racial and cultural balance carefully preserved by the prior quota system. In addition to legal immigration, there was a large influx of aliens from Latin America who subsequently were legalized during the amnesty offered in 1987 and 1988.\textsuperscript{419} According to one estimate, 300,000 Hispanic immigrants a year flow into the southern and western regions of the United States.\textsuperscript{420}

Like all other immigrant groups, these immigrants have brought with them their native languages. The influx of Spanish-speaking Hispanic immigrants has antagonized many Americans.\textsuperscript{421} Immigrants from Southeast Asia have also encountered hostility, violence, and language restriction.\textsuperscript{422}

\textsuperscript{417} Cf. Califa, supra note 401, at 297-99 (noting that the influx of Cubans, Mexicans and Southeast Asians after 1959 caused "concern among immigration restrictionists like the Federation for American Immigration Reform"); Fishman, supra note 161, at 133-34 (asserting that English-only movement stems from "anglo-oriented middle class Americans" worried about their loss of social and political power); David F. Marshall, The Question of an Official Language: Language Rights and the English Language Amendment, 60 INT'L J. SOC. LANGUAGE 7, 12-13 (1986) (describing post-Civil War xenophobia and fear of immigration).


\textsuperscript{421} Id. ("What especially galls longtime Floridians is not so much what they perceive as Hispanic Americans' slowness to learn English as the fact that native Americans are increasingly finding that they have to speak Spanish."); see also Retha Hill, English-Language Bill Attacked; Hispanics Fear State Measure Would Erect Barrier to Services, WASH. POST, Feb. 21, 1991, Maryland Weekly Section, at M1 (describing perceived need for official English legislation in Maryland because of belief that influx of Hispanic and Asian immigrants "[w]ould be a hindrance of the smooth operation of government").

\textsuperscript{422} See, e.g., Frederic M. Biddle, English Language Called Racist; Critic Slams It As 'Unwelcoming' to Immigrants of Color, BOSTON GLOBE, Apr. 2, 1991, at 18 (discussing a Lowell, Massachusetts official English ordinance directed at recent Laotian immigrants, which a local professor described as "legitimiz[ing] resentment against non-native English speakers"); see also Felicity Barringer, Ideas & Trends: A Land of Immigrants Gets Uneasy About Immigration, N.Y. TIMES, Oct. 14, 1990, at 4 (describing hostility towards Asian immigrants because of their perceived threat to "linguistic cohesion").
The racial and cultural differences of recent immigrants from the core culture have not gone unnoticed.

2. Official English and Immigration

Part of U.S. English’s original program was to “control immigration so that it does not reinforce trends toward language segregation.” The organization intended to lobby for legislation to restrict immigration that would reinforce the maintenance of certain languages, particularly Spanish, which, after English, is the second most-used language in this country. This means limiting the immigration of Hispanics, who are depicted as advocates of “language segregation.” Its original emphasis on restricting immigration is not surprising. This has been a long-time goal of Dr. John Tanton, founder and former chairman of U.S. English.

Dr. Tanton has long advocated immigration restrictions, particularly on immigration from Hispanic countries. In a now infamous memo, Dr. Tanton expressed his grave concerns about Hispanic fertility and reproduction, Catholicism, and the threat that Hispanics pose to white Anglo dominance of American society:

How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with 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? ...

... Gobernar es poblar translates “to govern is to populate.” In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? ...

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

423. Wright, supra note 34, at B3, quoted in Senate Hearing, supra note 33, at 64.
424. See Califa, supra note 401, at 326. Califa notes that the crux of Dr. Tanton’s concern is not the Spanish language per se but the Hispanic race itself. Id.
425. John Tanton, WITAN IV Paper 2, 4 (1986), quoted in Califa, supra note 401, at 326-27 & nn. 217-18, 222. Evidence also suggests former Senator Hayakawa’s bias against Hispanics. For example, in his prepared statement
Tanton's concern is the perceived threat that immigration presents to the dominant core culture. Tanton, echoing Benjamin Franklin's prejudiced views of the Germans in Pennsylvania 200 years ago, would exclude Hispanics by banning their immigration for twenty years. As the founder of U.S. English, Tanton must have seen this organization as a means consistent with his aims. Tanton's "smoking gun" statements only confirm what has been obvious to most Hispanics and many commentators: that official English is a movement fueled by prejudice and fear and directed at Hispanics.

3. The Appeal to National Unity

The official English movement renews the claim that national unity depends on ethnic purity—really conformity with the Anglo core culture—this time in the form of language. According to Hayakawa, multilingual election ballots present an "open threat . . . to our cherished idea of 'one nation, indivisible.'" Senator Huddleston, sponsor of the proposed constitutional amendment in 1984, made explicit his view of the submitted during the 1984 Senate Judiciary Committee hearings, he attributed all demands for bilingual services to "Hispanic political leaders" and, after describing the positive achievements of Asian immigrants, recited only the dismal statistics regarding the educational failures of Hispanics. See Senate Hearing, supra note 33, at 61. It is, however, hardly surprising that Hispanics, whose language is the second most spoken language in the United States, actively promote and protect their language and culture. A more balanced description than Hayakawa's would have noted the many Hispanic-Americans who have achieved distinction in private and public life.

426. Califa, supra note 401, at 327.
427. See id. at 324 ("Hispanics are concerned that the English-Only movement is an attempt to brand Hispanics as inferior and un-American."). Statistics demonstrate that a large majority of Hispanics oppose official English legislation. In Texas, only 35% of Hispanics polled in 1986 favored such legislation, and only 23% did so in 1988. In California, approximately 70% of Hispanics opposed the official English law enacted there. According to a New York Times/CBS poll conducted in 1987, 71% opposed a constitutional amendment designating English as the official language of government. See id. at 324 & n.205.

Joshua Fishman discussed the impact of the official English movement on Hispanics:

The Hispanic middle class is obviously faced with a 'no-win' situation. Either they must reject the charge of anti-Americanism or they must confirm it, and the only way they can reject the charge in today's climate of opinion is to vote for 'English-only' far more frequently than do other Hispanics (29%). Hispanics pay their own price, a doubly heavy price, for their membership, or membership aspirations, in the American establishment.

Fishman, supra note 161, at 134.
428. Senate Hearing, supra note 33, at 53.
connection between the English language and our national identity: "This amendment addresses something so fundamental to our sense of identity as Americans." According to Senator Denton, official English laws will "help to preserve the basic internal unity" of our country.

This perceived threat to the English language, however, is not supported by fact. English is ubiquitous. Between ninety-four and ninety-six percent of the American population is English-speaking. Fully eighty-five percent of the population claims English as its mother tongue. Furthermore, English enjoys virtual hegemony as an international language of business, commerce, and interaction between nations. The unparalleled international status of English as "the world's most prestigious, most effective, and most sought-after vehicle of communication" only reinforces its importance. Given the national and international status of English, concerns about its deterioration (and ours), echoed throughout our history, are greatly overstated. Since fact does not support claims of deterioration of the English language, nor of national disunity, something else must be going on.

4. The Demand for Disenfranchisement

Since its inception, one of the official English movement's principal goals has been to eliminate bilingual, or more correctly, multilingual voting ballots. This can be accomplished only through the Congress's repeal, or refusal to extend, provisions in the 1975 amendments to the Voting Rights Act. Proponents of official English offer the following arguments in favor of English-only ballots. English-only ballots are very popular (especially among persons who speak only English). Bililingual ballots make many people very distressed and angry. According to Hayakawa, this distress and anger does not result from "ethnic prejudice or hostility," but rather from "the open

429. Id. at 15.
430. Id. at 11. Senator Denton asserted that the "language barrier that plagues millions of Americans each year" is a major source of "discrimination [against] and exploitation" of those who do not speak English. Id.
431. Fishman, supra note 161, at 129.
432. Id.
433. Cf. Senate Hearing, supra note 33, at 57-58 (statement of Hayakawa) (stating that one English-only association, Californians for Ballots in English, delivered 626,321 signatures to registrars on an initiative requiring the governor to petition the president and Congress to relieve California from having to provide non-English voter and ballot information).
434. Id. at 59 (statement of Hayakawa).
threat” to our national unity posed by multilingual ballots.435

Proponents of official English argue that English-only ballots create incentives for citizens to learn English and to realize that they cannot enjoy full participation in American life without learning English. Furthermore, the argument runs, multilingual ballots impair the political process because they make some voters dependent on “interpreters or go-betweens,” because they preserve “minority voting blocks,” and because voters whose primary language is not English will not be “as fully informed as possible” when they go to the polls.436 Proponents of official English thus claim that multilingual ballots reduce political participation, a claim glaringly at odds with the obvious access to political participation that multilingual ballots provide to non-English speakers.437

These arguments deserve brief response. First, English-only ballots create no meaningful incentive to learn English, particularly given the overwhelming social and economic incentives to learn English. English-only ballots disenfranchise citizens who, for various reasons, have retained a language other than English.438 According to a 1982 study by the Mexican-American Legal Defense and Educational Fund, seventy-two percent of monolingual Spanish-speaking citizens would be less likely to vote without the language assistance the Voting Rights Act requires.439 Similarly, monolingual citizens speaking other non-English languages also would be disenfranchised.

Second, voters who rely on American newspapers printed in languages other than English, such as Miami’s main newspaper, the Miami Herald, which is published daily in both Spanish and English editions, can be fully informed about the issues

435. Id.
436. Id. at 20 (testimony of Sen. Huddleston).
437. Califa, supra note 401, at 306-07 (emphasizing the need for bilingual assistance in voting); see also supra note 413 (describing the multilingual provisions of the Voting Rights Act).
439. Califa, supra note 401, at 306 n.104 (citing R. Brechetto, Bilingual Elections at Work in the Southwest 100, table 28 (1982)).
in an election. The Supreme Court recognized as much when, in 1966, it upheld the Voting Rights Act in *Katzenbach v. Morgan*. The Court stated that ability to read or understand Spanish-language newspapers, radio, and television is as effective a means of obtaining political information as ability to read English.

The movement's concern about "minority voting blocs" defined by language both expresses fear of the political power of Hispanics and the offensive assumption that minority group members think alike and vote alike. If proponents of official English are truly concerned about ethnic voting blocs, they should also be equally concerned about English-speaking ethnic voting blocs. Their concern, however, is only about ethnicity, Hispanic or Asian, different from that of the core culture.

Furthermore, the movement vastly overstates the competence and political participation of members of the majority core culture. Only about half of all eligible voters usually vote. Are all voters "as fully informed as possible?" Why deny access to multilingual ballots to citizens who do care enough to vote? And why hold only minority voters to a standard of "being as fully informed as possible" for voting? The movement's arguments amount to saying that people who do not know English are too ignorant to make informed voting decisions, an offensive presumption common throughout our history.

Congress enacted the 1975 amendments to the Voting Rights Act, which provide for bilingual ballots in certain geographic areas, to eliminate pervasive discrimination against citizens in voting. Congress found that "voting discrimination against citizens of language minorities is pervasive and national in scope." Furthermore, Congress found that "[p]ersons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation of discriminatory practices concerning Asian Americans . . . [is]..."

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440. Schmalz, supra note 420, at A1. Moreover, the radio station boasting the largest advertising revenues in the Miami area in 1987 was a Spanish-only station. *Id.*
442. *Id.* at 655.
This discrimination was accomplished by state and local officials who conducted elections only in English. Repeal of this legislation will likely return this country resolutely to the pervasive discrimination that existed prior to its enactment.

A principal aim of official English advocates is to repeal parts of the Voting Rights Act. If this aim was publicized in these terms, it would be clear that they seek to impair and effectively deny the right to vote to American citizens whose language may not be English. Stated in this manner, the goals of the movement would be significantly less attractive politically. Since the direct goal is politically unattractive, they have couched the argument by indirectness, by proxy, using principally the Spanish language as a catalyst for nativism. A very similar use of language as a proxy device for national origin was the basis for President Taft's veto of initial attempts to pass literacy requirements for admission to the country. The advocacy of language restrictions is, therefore, an old technique for discrimination on the basis of national origin.

VIII. AN EVALUATION OF OFFICIAL ENGLISH

A. LANGUAGE AS SYMBOL

The historical record demonstrates both the significant legal recognition and protection given to different languages and the nativist restrictions imposed through the law on language. While many aspects of this history are virtually unknown within the legal academy, scholars of language and politics and sociolinguistics have long been aware of the political significance of language. The work of scholars in these disciplines provides a framework within which to assess the current meaning and symbolism of the official English movement.

Language is both our principal means of communication and a social symbol, malleable and capable of manipulation for the achievement of social or political goals. As one scholar states,


446. See Henry L. Bretton, Political Science, Language, and Politics, in LANGUAGE AND POLITICS 431, 434 (William O'Barr & Jean O'Barr eds., 1976). Bretton argues that language opens the door to power and wealth, pointing to the historical hegemony of Latin and French and suggesting that they were elite languages "beyond the reach of the masses." Id.
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[t]here is of course no such thing as an 'apolitical' language as there is
no such thing as an 'apolitical' person. . . . Politics is human relations,
and language is an organic component of such relations. It is simply
impossible to disassociate languages from the contexts in which they
are learned and used. 447

For this reason a study of context, for our purposes the history
of the legal treatment of ethnicity and different American lan-
guages, is fundamental for an understanding of the symbolic
meaning of language.

The context contains many components, social and legal.
In America we have (and always have had) a situation where
many languages coexist, with the English language dominant.
Spanish, for example, is the second most-used American lan-
guage. 448 Sociolinguists sometimes refer to this situation as
diglossia, defined as "[a] situation where two languages coexist
in the same speech community but differ in domains of use, at-
titudes toward each, and patterns of acquisition and profi-
ciency." 449 As we can infer from this definition, coexistence
does not imply equal dominance, prestige, or spheres of
influence.

Discussions of different languages and other aspects of
ethnicity are discussions of human differences. 450 And "it is al-
most an axiom of human society that . . . [h]ierarchy is found
everywhere superimposed upon difference." 451 So it is with
languages. Different languages have very different prestige values in our society. 452 These differences in prestige manifest

447. Id. at 437.
448. See Charles A. Ferguson & Shirley Brice Heath, Introduction to Lan-
guage in the USA, supra note 10, at xxv, xxv. The United States is either the
fourth or fifth largest Spanish-speaking country in the world. THOMAS WEYR,
449. Joan Rubin, Language and Politics from a Sociolinguistic Point of
View, in Language and Politics, supra note 446, at 389, 399; see also Fran-
cois Grosjean, Life with Two Languages 130-32 (1982); Josiane F. Hamers
450. Cf. Minow, supra note 4, at 232-36 (describing the uses of language in
shaping, categorizing and evaluating human difference from a feminist
perspective).
451. William O'Barr, Boundaries, Strategies, and Power Relations, in Lan-
guage and Politics, supra note 446, at 405, 415. Further, as Professor Mat-
suda has written, speech "serves an important function in addition to
communication of ideas. Speech also positions people socially. In many socie-
ties, certain dialects and accents are associated with wealth and power." Mari
J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Juris-
452. Rubin, supra note 449, at 394; see also John J. Gumperz & Jenny
Cook-Gumperz, Introduction: Language and the Communication of Social
Identity, in Language and Social Identity 1, 7 (John J. Gumperz ed., 1982)
themselves through bias, conscious or unconscious, for or against certain languages.\textsuperscript{453}

The perceived intelligibility, for example, of languages is influenced by these prestige rankings. For instance, if the people who speak a particular language have prestige and power, people perceive their language as easy to understand.\textsuperscript{454} Conversely, the languages of groups perceived as lacking in prestige and power, or groups who are the objects of prejudice, are often perceived as difficult to understand.\textsuperscript{455}

Discourse itself, the expression of ideas, and the ordering of discourse, who gets to express ideas, who gets to express them first, and which ideas get expressed, also reflect hierarchy and relationships of power in society. As Michel Foucault wrote, "as history constantly teaches us, discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle . . . . [D]iscourse is the power which is to be seized."\textsuperscript{456} For example,

\begin{quote}
("[I]n the United States, American English is the primary language of the indigenous population but this common language hides an underlying diversity in values and discourse conventions. These differences were for a long time dismissed as nonstandard language practices that detracted from the potential effectiveness of the group as communicators, even though the first language of the group was English."); C. Bouchard Ryan & M.A. Carranza, Ingroup and Outgroup Reactions to Mexican American Language Varieties, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS, supra note 28, at 59, 61 (explaining how assimilationist forces in America cause society to value "being American" and "speaking American" so that there is "linguistic pressure to speak English at the expense of other [languages]. This pressure is based on the implicit assumption that English is superior and all other [languages] inferior.").
\end{quote}

\textsuperscript{453} See Matsuda, supra note 451, at 1351-52 & nn.81-82 (noting that speech contributes to social position); cf. Charles R. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322-23 & nn.20-26 (1987) (explaining that much bias is unconscious and results from "deeply imbedded" cultural experiences).

\textsuperscript{454} Rubin, supra note 449, at 394.

\textsuperscript{455} Id. Spanish is sometimes deemed a low-status language in this country. Roseann Gonzalez describes the low status assigned to Spanish and reports that "the enduring sentiment variously held by a number of Americans [is] that Spanish speakers are 'illiterate, impoverished, [and] backward.'" Roseann D. Gonzalez et al., Language Rights and Mexican Americans: Much Ado About Nothing (May 6-9, 1988) (presented at Minority Language Rights and Minority Education: European and North American Perspectives, Cornell University), reprinted in House Hearings, supra note 403, at 181, 183-85.

It is the low status assigned to the Spanish language by the dominant culture that accounts for persistent, derogatory, references to Spanish-speakers as generating a "tower of babel" within the United States. The inability of many persons to understand Spanish does not make the language itself inherently unintelligible, or any less intelligible than English.

\textsuperscript{456} Michel Foucault, The Order of Discourse, in LANGUAGE AND POLITICS
access to public forums or the press is an ample power indeed. The presence or absence of certain languages, their encouragement within or elimination from certain public forums, like the ballot in public elections, reflect the results of this struggle and the presence or absence of domination. Furthermore, discourse and the order of discourse are governed by ritual, and are thus endowed with social significance. Accordingly, we pay more attention to those discourses made significant through rituals with social sanction than to others.

There are rules, formal and informal, conscious and unconscious, governing our discourse: "[I]n every society the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures whose role is to ward off its powers and dangers." These principles, expressed in the context of discourse within a single language, apply with equal force to discourse in different languages, for a multilingual society must allocate its discourses and maintain rules to govern discourses in different languages. Legal rules or sanctions regarding discourse or the proper languages of discourse thus control that discourse and create hierarchy in the power of discourse.

To some extent, language usage is self-regulating and reflects existing hierarchy. Speech communities may be defined as "[t]hose with whom we share a consensus about language structure, language use, and norms for interaction . . . [and communities] within which we expect speaker intent and listener comprehension to mesh." Speech communities gener-

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108, 110 (Michael J. Shapiro ed., 1984); see also Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL. L. REV. 95, 95 (asserting that "expression is power").

457. Cf. FOUCAULT, supra note 4, at 225 (explaining that ritual "defines the qualifications required of the speaker, . . . lays down gestures to be made, behaviour, circumstances, and the whole range of signs that must accompany discourse; finally, it lays down the supposed or imposed significance of the words used"); Foucault, supra note 456, at 114 (arguing that a hierarchy of discourse exists). For example, we pay more attention to the president giving his state-of-the-union address before Congress than to a homeless heckler outside because ritual socially sanctions the president’s speech.

458. Foucault, supra note 456, at 109; see also FOUCALUT, supra note 4, at 220 ("[T]here are, of course, many other systems for the control and delimitation of discourse . . . . I believe we can isolate another group: internal rules, where discourse exercises its own control; rules concerned with the principles of classification, ordering and distribution."); Gumperz & Cook-Gumperz, supra note 452, at 7 (discussing the relation between accepted modes of discourse and the bureaucratic system).

459. CONKLIN & LOURIE, supra note 8, at 110. This “speech community” shares a consensus on the proper use of language. Id.
ally know and define appropriate rules for the use of different languages at different times. These rules can be both formal, as in a statutory rule, and informal, such as the unwritten rules governing the overwhelming number of economic and social situations in which English would be considered the appropriate language to use. The importance of informal English-language requirements should not be underestimated: knowledge of English is essential to success in the economy, in education, and in society. These are powerful incentives that have always led immigrant peoples to acquire English.

Furthermore, government can manipulate differences in language competence for political purposes, such as by controlling access to power by requiring certain degrees of language competence so particular groups are favored and others disfavored. "Requiring a functional knowledge of the language for participation in political arenas in effect defines a boundary which impedes the political access of some citizens." The official English movement aims to regulate access to the political process through language in this manner.

The symbolic value of a particular language can be made important as an aspect of nationalism. Furthermore, political problems are often sublimated into language problems. Language is often the bearer of strains and problems not related to communication. Despite its use as a symbol of na-

460. Id.
462. For a detailed analysis of Hispanic learning patterns, see Califa, supra note 401, at 314-16 & nn.141-57.
463. See O'Barr, supra note 451, at 413, 418; see also Howard Giles et al., Towards a Theory of Language in Ethnic Group Relations, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS, supra note 28, at 307, 307-08 (describing the use of language as a means of subordinating linguistically different groups).
464. Cf. O'Barr, supra note 451, at 413 (using Tanzania as an example of a nation that requires functional knowledge of Swahili as a condition precedent to political participation).
465. Id.
466. See Rubin, supra note 449, at 396. The official English movement makes the more extreme argument that our national unity depends on the societal imposition of English. See supra text accompanying notes 428-30.
467. Cf. Rubin, supra note 449, at 396-98 (describing the use of language as a political, economic and nationalist device). See generally O'Barr, supra note 451 (discussing the role of language in creating political and social boundaries).
tionalism, language is a poor proxy for political unity. As one writer has noted, "[c]ommunity of language and culture ... does not necessarily give rise to political unity, any more than linguistic and cultural dissimilarity prevents political unity."\textsuperscript{468} Political structures, therefore, are "not necessarily coterminous with language communities."\textsuperscript{469}

Given the symbolic and psychological values attached to language, important psychological consequences result when the government intervenes and establishes language policies. As one scholar has explained,

one should not minimize the psychological effects which language policies handed down from above have upon individuals. One's language is intimately associated with the individual; new languages are difficult to learn; and language is a particularly easy tool to use in political control. Therefore, when language policies establish boundaries between people and government the effects are likely to be quite significant: alienation, distancing, and political impotence. . . . Thus, language can be used not only to establish real boundaries but to communicate attitudes and feelings of government toward people as well.\textsuperscript{470}

In a democracy, the attitudes and feelings of "government" are those of the majority or its representatives. Thus the majority can manipulate language and language laws to express its approval or disapproval of favored or disfavored groups within the society.

Often in our society favored and disfavored groups are defined by their ethnicity: race, national origin, religion, ancestry, and language. Language often has been the basis for discrimination against groups whose language is not English.\textsuperscript{471} Lan-

\textsuperscript{468} AFRICAN POLITICAL SYSTEMS 23 (Meyer Fortes & E.E. Evans-Pritchard eds., 1940), quoted in O'Barr, supra note 451, at 410-11.

\textsuperscript{469} O'Barr, supra note 451, at 411. For example, despite the official English movement's claim that other languages threaten national unity, America's greatest political conflicts have been between people of similar ethnicity who spoke the same language. Both the Revolutionary and the Civil Wars, for example, were fought principally between peoples of similar ethnicity who all spoke English. Therefore, in the face of deep political divisions, the fact of shared language was inconsequential. Having a shared language does not necessarily create internal unity.

\textsuperscript{470} Id. at 414; see also Ryan & Carranza, supra note 452, at 63 (asserting that "hostility and resentment are often engendered in Spanish speakers who are pressed into viewing their language as 'inferior' ").

\textsuperscript{471} See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 351-52 (1986) (explaining that "[a] distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American history: discrimination against members of the cultural minority").
language is a fundamental symbol of ethnicity. As Joshua Fishman has written,

"by its very nature language is the quintessential symbol, the symbol par excellence. . . .

. . . [I]t is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious in and of itself. The link between language and ethnicity is thus one of sanctity-by-association. . . . Anything can become symbolic of ethnicity . . . but since language is the prime symbol system to begin with and since it is commonly relied upon so heavily (even if not exclusively) to enact, celebrate and "call forth" all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed. . . . [I]ndeed, it becomes a prime ethnic value in and of itself. 472

Language is thus a crucial symbol of ethnicity. This is just as true of English as of Spanish or any other language. English is a crucial symbol of the ethnicity of America's dominant core culture. Language can be a symbol of group status, a symbol of dominance, and a symbol of participation in or exclusion from the political process. Campaigns to make a language standard or official can thus be seen as attempts to create or reinforce the dominance of the culture of which the language forms an integral part. 473

B. OFFICIAL ENGLISH LAWS VIOLATE THE EQUAL PROTECTION CLAUSE

Modern constitutional law must recognize that certain classifications based on language or language ability, and in particular official English laws, violate the Equal Protection Clause. 474 Official English laws violate the Equal Protection Clause by creating invidious classifications in a number of ways. First, official English laws use language as a proxy for unpopular national origin. Accordingly, courts should review such laws as

473. See Giles et al., supra note 463, at 307-08 (arguing that dominant groups can "manipulate language . . . by . . . enforcing their linguistic values on subordinate groups by large-scale legislation" when their dominant status is threatened).
474. Earlier Supreme Court decisions held that prohibitions on the use or teaching of certain languages constituted deprivations of liberty under the substantive due process doctrine. See Yu Cong Eng v. Trinidad, 271 U.S. 500, 528 (1926); Meyer v. Nebraska, 262 U.S. 390, 403 (1923). Although the substantive due process rationale of these cases is no longer completely accepted, it is important to note that the Court recognized that language restrictions deny liberty.
invidious classifications based on national origin and subject them to heightened scrutiny. Furthermore, official English laws are motivated in large part by nativism, which courts should recognize to be an unconstitutional motivation. Lastly, courts and legislatures should recognize the full measure of inequality created by official English laws. This inequality, though perhaps not obvious at first glance, is the creation of second-class citizenship for all Americans whose primary language is not English. For all of these reasons, official English laws violate the Equal Protection Clause of the Fourteenth Amendment.

1. Language as a Proxy for Unpopular National Origin

The courts, in several contexts, have recognized that language discrimination can be a proxy for national origin discrimination. In *Hernandez v. New York*, a Court plurality recognized that language can function as a proxy for race. Justice Kennedy, writing for the plurality, stated that

\[\text{[w]e would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.}\]

The plurality also recognized the links between language, ethnicity, and personal identity.

Although the Court has not decided many cases focusing directly on language restrictions, it has invalidated such restrictions under the Fourteenth Amendment. In *Meyer v. Nebraska*, for example, the Court found that state laws prohibiting instruction in German violated the Due Process

\[475. \text{ Our history demonstrates a tradition of the use of language as a proxy for national origin discrimination. See discussion supra part VII.}\]

\[476. 111 S. Ct. 1859 (1991).\]

\[477. \text{Id. at 1872-73; see also id. at 1877 (Stevens, J., dissenting) (asserting that "an explanation [for striking prospective jurors] that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice"). Hernandez examined peremptory challenges directed at Latino jurors because of their bilingualism and demeanor. The Court decided that such challenges did not violate the Equal Protection Clause. Id. at 1873.}\]

\[478. \text{Id. at 1872-73 (emphasis added).}\]

\[479. \text{See id. at 1872.}\]

\[480. \text{In Hernandez, the Court avoided deciding the question of language discrimination by finding that the prosecutor had acted because of both the prospective Latino jurors' bilingualism and their demeanor. Id. at 1872.}\]

\[481. 262 U.S. 390 (1923).\]
Clause of the Fourteenth Amendment. The Meyer court wrote that “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” In Yu Cong Eng v. Trinidad, the Court considered the constitutionality of a Philippine law that prohibited Chinese merchants from keeping their business account books in Chinese, the only language these merchants knew. Finding that enforcement of the law “would seriously embarrass all of [the Chinese merchants] and would drive out of business a great number,” the Court held that the law denied the merchants due process and equal protection under the Fourteenth Amendment.

Although Meyer and Yu Cong Eng, decided in 1923 and 1926, respectively, are decisions based on the substantive due process doctrine of that period, they have continuing vitality. The Hernandez plurality cites them to support the proposition that language may be treated as a proxy for race for purposes of an equal protection analysis. Accordingly, language may properly be considered a proxy for race and, by extension, national origin.

Furthermore, in analogous areas of civil rights law, discrimination because of language has also been treated as a proxy for national origin discrimination. Courts interpreting Title VII of the Civil Rights Act of 1964, for example, have concluded that discrimination on the basis of language and accent can be prohibited as forms of national origin discrimination. The Equal Employment Opportunity Commission

482. Id. at 400.
483. Id. at 401.
484. 271 U.S. 500 (1926)
485. Id. at 508-09.
486. Id. at 514.
487. Id. at 524-25.
491. See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) (holding that district court appropriately issued preliminary injunction under Title VII against enforcement of employer's rule prohibiting use of languages other than English), vacated as moot, 490 U.S. 1016; Carino v. University of Oklahoma Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (finding that employers may not make "adverse employment decisions" based on an employee having an accent where the accent does not interfere with the em-
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(EEOC), the federal agency charged with enforcing Title VII, has construed the prohibition against national origin discrimination broadly to include discrimination because of characteristics associated with different national origin. The EEOC also recognizes that "[t]he primary language of an individual is often an essential national origin characteristic."\(^{492}\) EEOC regulations prohibit discrimination against someone because she possesses the "physical, cultural, or linguistic characteristics of a national origin group."\(^{493}\) Legal commentators also have recognized the essential and inextricable link between language and national origin.\(^{494}\)

There has, therefore, been a broad recognition on the part of courts, the EEOC, and commentators that language appropriately can be considered a proxy for national origin. Statistics also reflect the strength of the connection between language and national origin. A 1984 study indicates that ninety-seven percent of persons who usually speak Spanish are of Hispanic origin.\(^{495}\) According to the same study, approximately seventy-seven percent of American Hispanics speak Spanish.\(^{496}\) These statistics demonstrate how close a proxy language is for an employee's ability to perform job duties; see also Court Strikes Down English-Only Rule as Unlawful Discrimination under Title VII, 169 DAILY LAB. REP., Oct. 9, 1991, at A-8 (describing Garcia v. Spun Steak Co., No. C-91-1949 RHS, 1991 WL 268021 (N.D. Cal. Oct. 23, 1991)). But see Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (concluding that, for bilinguals, there is not necessarily a nexus between national origin and language), cert. denied, 449 U.S. 1113 (1981).

\(^{492}\) 29 C.F.R. § 1606.7(a) (1989).

\(^{493}\) Id. § 1606.1.

\(^{494}\) See, e.g., Karst, supra note 471, at 351-57; Matsuda, supra note 451, at 1329; Myres S. McDougal et al., Freedom from Discrimination in Choice of Language and International Human Rights, 1 S. ILL. U. L.J. 151, 152 (1976) (asserting that "language is commonly taken as a prime indicator of an individual's group identifications"); Perea, supra note 498, at 274-79; Bill Piatt, Toward Domestic Recognition of a Human Right to Language, 23 HOUS. L. REV. 885, 894-901 (1986); Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 HARV. L. REV. 1345, 1355 (1987) [hereinafter Note, Federal Limits] (arguing that "courts might determine that [language-based] classifications in fact discriminate on the basis of national origin" because litigants "have argued that no factor is more intimately tied to a person's ethnic or national identity than is language") (citation omitted); see also Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L.J. 1164, 1165 (1984) [hereinafter Note, Trait-Based Approach] (asserting that "[d]ifferences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself").


\(^{496}\) Id. at 383.
tional origin and, accordingly, how close a fit language discrimi-

More recent statistics from the 1990 United States Census
show the numbers of persons potentially affected by language
restrictions and language discrimination. According to the 1990
census, the United States had 230.4 million persons five years
old and over. The number of such persons reporting that
they spoke Spanish at home was 17.3 million persons. The
number of persons who speak languages other than English, in-
cluding Spanish plus any other non-English languages, at home
was 31.8 million persons, well over ten percent of the popula-
tion. Assuming that the language spoken at home is a strong
indicator of one's primary language, language restrictions may
affect well over ten percent of the American population. Since
these numbers do not include children under five years old, the
statistics actually under-count the number of persons whose
primary language is not English.

The Spanish language, therefore, functions as a very close
proxy for Hispanic national origin. The anti-Hispanic origins of
the official English movement provide ample evidence that,
under present circumstances, proposals for official English leg-
islation in fact represent discrimination against Hispanics, in
principal part, framed by proxy and indirection through the
closely correlated medium of language. Courts should sub-
ject discriminatory state action based on language, because of
its inextricable relationship to ethnicity and national origin, to
heightened scrutiny and should find it unconstitutional.

497. Telephone Interview with Stephanie Profit, United States Census Bu-
reau Regional Office, Atlanta, Ga. (June 1992). I have rounded the data to the
nearest tenth of a million.

498. Id. The number of Spanish speakers who reported that they did not
speak English very well was 8.3 million, slightly less than half the total. Id.

499. Id.

500. See discussion supra part VII.C. The use of referenda to enact official
English laws by direct majority vote, because they bypass usual representative
legislative processes, are constitutionally suspect. See Arington, supra note
410, at 342-49. Accordingly, courts should scrutinize official English laws en-
acted in this manner closely.

501. The Supreme Court recognized the link between language and na-
tional origin: "Language permits an individual to express both a personal
identity and membership in a community, and those who share a common lan-
guage may interact in ways more intimate than those without this bond." Her-
ately, this sentiment did not influence the Court's decision, which
permits the use of peremptory challenges to exclude bilingual jurors. Indeed,
one interpretation of Hernandez is that the Court's own fear of language dif-
ference affected the outcome.
2. Official English Laws are Motivated by Nativism, an Unconstitutional Motivation

The anti-Hispanic origins of the official English movement demonstrate that traditional nativism is a major factor underlying the movement.\footnote{People may support official English laws for many reasons, only one of which is the nativist rejection of Hispanics, Asians and other people deemed to be foreign. Some, for example, may support these laws believing that an official language may be a valuable tool in unifying American culture or ensuring uninhibited participation in the economy. While these beliefs may be sincere, the overwhelming majority of Americans already speak English, suggesting that no such law is necessary. \textit{See} Califa, \textit{supra} note 401, at 294 & n.7. Furthermore, the official English movement has only recently abandoned its overtly nativist rhetoric and leadership. \textit{See supra} notes 415-16 and accompanying text.} It is well established that state action based directly on race or national origin is subject to strict judicial scrutiny and violates the Equal Protection Clause.\footnote{Hernandez \textit{v.} Texas, 347 U.S. 475, 478 (1954); Korematsu \textit{v.} United States, 323 U.S. 214, 216 (1944).} Because of this relatively recent constitutional development, modern nativism cannot operate in its traditional ways.\footnote{\textit{See} \textit{HIGHAM}, \textit{supra} note 30, at 4.} Laws targeting minority groups directly because of their national origin, such as the internment of Japanese-Americans at issue in \textit{Korematsu}, or overt discrimination against Hispanic-Americans, would be unconstitutional today. Increasingly, our society has rejected overt racism as immoral and unsophisticated.\footnote{Lawrence, \textit{supra} note 453, at 335.} For these reasons, modern nativism and racism can operate only through the law on a symbolic level, using seemingly unobjectionable symbols or proxies associated with differing national origin as objects for its oppressive legislation.

The presence of languages other than English in public forums angers many Americans. Their anger depends on the false assumption that American identity is exclusively a homogeneous, monolingual, English-speaking identity, an assumption history refutes. This anger can be understood as a rejection of the concept that Americans speak languages other than English and the concept that political power must be shared with American citizens who speak different languages and who do not conform to the dominant culture. This resentment reflects the oft-repeated fear and distrust of language difference. Their anger, and its displacement into the arena of language law and policy, is nativism, modern style.

Proponents of official English make much of the fact that
their initiatives are popular and, when enacted, are enacted by overwhelming margins. Increasingly, official English laws have been enacted by a direct vote on an initiative or a referendum, rather than representative legislative processes.\textsuperscript{506} Popularity, however, is not the same as constitutionality. Although proof of legislative motivation is difficult, evidence exists showing that multilingual ballots make many people "distressed or angry."\textsuperscript{507} The overwhelming popularity of these laws proves what most Hispanics have already learned: that many people either dislike or ignore Hispanic culture and the Spanish language. The popularity of official English laws only proves, as Congress recognized in its 1975 amendments to the Voting Rights Act,\textsuperscript{508} that Hispanics are an unpopular minority that has suffered a long history of discrimination implemented in part through language discrimination.

Americans share a common cultural heritage in which differences from the core culture, including differences of race, national origin, and language, have been viewed as "foreign" and subversive of American democracy.\textsuperscript{509} Difference in America has truly become a focal point for distrust.\textsuperscript{510} It is this feature of our culture that should alert courts to scrutinize closely legislation that restricts the expressions of ethnic difference in our culturally pluralistic society. Courts should thus recognize that nativism is an unconstitutional motivation for state action. The nativist motivations of the official English movement should subject their legislative achievements, upon proper challenge, to heightened judicial scrutiny.

\textsuperscript{506} See Arington, supra note 410, at 342-49.

\textsuperscript{507} Senate Hearing, supra note 33, at 53 (statement of Hayakawa); see also Gerda Bikales, Comment: the other side, 60 INT’L J. SOC. LANGUAGE 77, 81 (1986) (asserting that “[t]here is deep resentment against the displacement of English in our country, and against the acceptance of alternative languages in public usage"). Bikales is the executive director of U.S. English. Id. at 85.


\textsuperscript{509} Cf. Lawrence, supra note 453, at 339-44 (describing our cultural heritage of racism).

\textsuperscript{510} Cf. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). In Croson, the plurality expressed distrust of decisions of the Richmond city council, which was predominantly black, citing the possibility of “simple racial politics.” Id. at 493 (plurality opinion). Justice Marshall, in dissent, objected to the use of strict scrutiny in evaluating remedial measures enacted by municipalities with black leadership, asserting that such “insulting judgments have no place in constitutional jurisprudence.” Id. at 555 (Marshall, J., dissenting).
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3. The Official English Classification: The Creation of Unequal Insiders and Outsiders Through the Law

Historical context provides a guide to interpreting the cultural meaning that language difference has in our culture and to understanding the kind of inequality official English laws create. In addition, the Supreme Court's decisions under the Establishment Clause demonstrate the Court's sensitivity, in the First Amendment context, to both the coercion present in government-sponsored religious observances and symbols and the insider and outsider statuses such government sponsorship creates. These decisions, by analogy, also help in interpreting the meaning and symbolism of language and language laws.

The Court has recognized the unconstitutional coercion and outsider status created by government-sanctioned symbols in its Establishment Clause jurisprudence. The Court has consistently rejected prayers or prayer-equivalents in public schools as violations of the First Amendment. In *Lee v. Weisman*, the Court held that a "nonsectarian" invocation and benediction, prepared pursuant to a set of "Guidelines for Civic Occasions" and delivered at a high school graduation, violated the Establishment Clause. The Court recognized the "particular risk of indirect coercion" of students who, as a result of state action, faced the choice of whether to miss their graduation ceremonies or be subjected to a coerced and unwanted invocation and benediction. The Court reasoned that "[t]o recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means."


513. *Id.* at 2655.

514. Distinguishing between young students and adults, the Court explained that it did "not address whether that choice is acceptable if the affected citizens are mature adults." *Id.* at 2658. Although the degree of coercion may differ, I believe that it would nonetheless be present for adults.

515. *Id.* at 2659.
As it wrote in *Engel v. Vitale*,\(^{516}\) "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."\(^{517}\) More generally, the Court has recognized a broad individual freedom of thought and conscience, forcefully expressed in *West Virginia Board of Education v. Barnette*.\(^{518}\) "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\(^{519}\)

Recognizing the danger of state-sponsored orthodoxy, the *Weisman* Court was also sensitive to the injury inflicted upon nonconforming persons by state-sanctioned religious symbols. The injury is that a nonbeliever or dissenter is forced by the state to either accept, or at least acquiesce in, a religious expression offensive to the nonbeliever.\(^{520}\) Through its overt promotion of religious observance, the state in effect creates a class of insiders, those believers not offended by the religious observance, and a class of outsiders, those nonbelievers or outsiders who dissent from the majority's beliefs.\(^{521}\) In her concurring opinion in *Wallace v. Jaffree*,\(^{522}\) Justice O'Connor aptly described this state-created outsider status:

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517. *Id.* at 431; *see also* 112 S. Ct. at 2675 (Blackmun, J., concurring) (explaining that some of the Framers understood the First Amendment to prevent government endorsement of any particular religion).
518. 319 U.S. 624 (1943).
519. *Id.* at 642. *See generally* TRIBE, supra note 511, § 15-5 (summarizing the Court's treatment of government practices which compel certain beliefs).
520. The Court explained that

  for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real . . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

112 S. Ct. at 2658.

The Court has not been consistently sensitive about this issue, however. *See Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (upholding the display of a crèche among secular symbols of Christmas in a city-sponsored display); *see also* TRIBE, supra note 511, § 14-15 (discussing how the Court's analysis failed to explain why the crèche was not a government endorsement of religion).
521. *See* 112 S. Ct. at 2659.
[The Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."523

Symbols created by the state convey political ideas and status in the same way that religious symbols convey theological ideas and status.524 It is exactly this state-created coercion to conform and the resulting insider/outside stratification that is created by official English laws. Official English laws use language to create state-sponsored orthodoxy in language. One result is the psychological and linguistic coercion of persons who reject the orthodoxy.525 These laws also create classes of insiders and outsiders defined by language and ethnicity. Official English laws create and perpetuate relationships of domination and subordination between American languages, and the citizens speaking them.526 These laws, by sanctioning and reinforcing only the language and ethnic traits of the dominant culture to the exclusion of different, equally American, languages, in fact create great inequality.527

The dominance of the English language, coupled with its

523. Id. at 69 (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 668); see also Lynch, 465 U.S. at 701 (Brennan, J., dissenting) ("The 'primary effect' of including a nativity scene in the city's display is... to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche... . The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.").

In his concurring opinion in Weisman, Justice Blackmun also recognized the state-created outsider status faced by dissenting persons: "When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some." 112 S. Ct. at 2665 (Blackmun, J., concurring) (footnote omitted); see also Tribe, supra note 511, § 14-14 (explaining that, while separation between church and state does not bar religious involvement in politics, it does bar the government's symbolic endorsement of religion).

524. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943); see also discussion supra part VIII.A (explaining the power of language as a symbol).

525. See discussion supra part VIII.A.

526. See discussion supra part VIII.A.

527. Cf. T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1069 (1991) (asserting that there is actually "great inequality" in discourse between the races "because it is the white version that becomes the 'official story' in the dominant culture").
acceptance as the "normal" language of public discourse, obscures the extent to which, consciously or unconsciously, language operates to define in and out groups.\textsuperscript{528} The use of the English language and enhancement of its legal status through official language laws for the purpose of defining our national identity is entirely self-affirming for members of the dominant culture. There is no dissonance, no perception of inequality, for members of a dominant culture when they act to declare one of their ethnic traits, the English language, to be the language of official discourse.

Some of the forms of inequality that official English enactments create are obvious. If, through repeal of the 1975 amendments to the Voting Rights Act, multilingual ballots are entirely eliminated, discrimination in voting will re-emerge, denying voting rights to citizens whose primary languages are not English.\textsuperscript{529} State action allocating the right to vote based on English-language ability creates a major defect in our representative processes—the exclusion of politically vulnerable groups identified by language and national origin. Furthermore, in the employment context, official English enactments encourage employers to prohibit the use of languages other than English in their workplaces.\textsuperscript{530} Official English laws thus operate to eliminate non-English languages from among our most impor-

\textsuperscript{528} Early proposals to establish a national language academy sought to use English to define the "in group" of Americans. The association, in many legislative debates, of languages other than English with un-American identity suggests that an important part of the dominant culture's self-definition rests on English-speaking ability. Congress's adoption of an English literacy requirement for United States citizenship during the McCarthy era also evidenced this characteristic of the dominant culture.

\textsuperscript{529} Multilingual ballots, because they always include English, exclude no English-speaking person and include Americans who speak other languages. They are thus symbols of America's vibrant cultural pluralism, a reflection of a national commitment to include traditionally excluded groups and of core principles of representative government. These ballots tell a story of successful American pluralism.

\textsuperscript{530} See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031, 1044 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989); see also Court Strikes Down English-Only Rule as Unlawful Discrimination Under Title VII, supra note 491, at A-8 (describing Garcia v. Spun Steak, No. C-91-1949 RHS, 1991 WL 268021 (N.D. Cal. Oct. 23, 1991), in which the court found that an employer's English-only rule violated Title VII). The Regional Trial Attorney for the Equal Employment Opportunity Commission, Douglas J. Farmer, suggested that California's official English amendment may have heightened "employer consciousness to the [English-only] rules and emboldened them, improperly, to take those risks." Id.
tant public forums—government, the voting booth, and the workplace.

Official English laws produce less obvious, but no less invidious, forms of inequality even when they are not implemented. Indeed, some commentators have missed entirely the symbolism of official English laws. These commentators, while expressing concerns about the legality of implementing state official English laws in a manner that conflicts with federal law, seem content as long as these laws are only "symbolic."\(^{531}\) Hence, they argue, as long as these laws are not implemented, as long as they are merely symbolic and do not "do" anything, then they are unobjectionable as symbols of "national unity" or "linguistic unity."\(^{532}\)

As the Establishment Clause cases illustrate, state-sponsored symbols are not necessarily constitutional merely because they are symbols.\(^{533}\) One must examine the cultural meaning of the symbol.\(^{534}\) Suppose we had no Fourteenth Amendment and none of the ensuing jurisprudence under the Equal Protection Clause. Suppose, as a society, we ratify a constitutional amendment designating white as the official race of America and male as the official gender.\(^{535}\) Many, hopefully most,

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531. See Arington, supra note 410, at 328; Note, Federal Limits, supra note 494, at 1353 (explaining that "[a]s a symbolic gesture, a state's declaration of English as its official language violates no constitutional norms; a common language is a goal that all can share").

532. Arington, supra note 410, at 339. A striking feature of the debate about official English is the passivity of many commentators in accepting official English as merely a symbol. One commentator writes that "[s]ome of the laws declaring English a state's official language appear on their face to have little more significance than a state's choice of an official motto or the official state bird." Arington, supra note 410, at 339. The article proceeds to point out that Mississippi's official English statute is in the same statutory section designating "the official state flag, tree, bird, flower, land mammal, water mammal, fish, shell, waterfowl, insect and beverage." Id. at 339 n.96. Unfortunately, once these commentators accept official English laws as merely symbolic, the inquiry into their legality ends. The official designation of language, however, is of far greater moment than the official state fish, fowl or beverage.

533. See, e.g., County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 601-02 (1989) (finding the display of a nativity scene in the county courthouse unconstitutional); Lynch v. Donnelly, 465 U.S. 668, 725-26 (1984) (Brennan, J., dissenting) (concluding that the presence of a crèche in display was an unconstitutional endorsement of religion). But see id. at 668 (upholding the legality of a Christmas display which included a crèche among various other traditional symbols of Christmas).

534. See Lawrence, supra note 453, at 355-58.

535. Although adoption of such an amendment seems far-fetched, our history is rife with similar examples of state-sanctioned oppression of marginal-
Americans would find these official designations offensive. To a certain extent, however, these official designations would merely represent realities about the distribution of power and wealth in our society. Arguably, they merely confirm the dominance of certain types of people in society and are thus merely "symbolic" or representative of an existing social order.

What is it about these purely "symbolic" official designations that is offensive? First, they are not accurate symbols. The official race designation excludes many people of different races and colors who are as American as the "official." Yet the official designation makes no mention of them; it treats them as though they did not exist. Similarly with the official designation of the male gender; it would be as though the female gender did not exist. In the context of American history, a history rife with racism and sexism, such official designations would create stigmas of inferiority borne by people of color and women.536

Second, these official designations take fundamental aspects of individual identity and give some of them governmental sanction, while excluding others. Some traits will have more governmental sanction, and therefore greater prestige and power, than others. Those people with official traits will become "more equal" than others because of this official sanction. Thus even a merely "symbolic" enactment creates inequality with respect to the traits given or not given official sanction. State action that designates certain ethnic traits as "official," consigns all persons lacking official traits to second-class citizenship.

It is, therefore, wrong to interpret the language symbol as "neutral" or unobjectionable if official English laws are deemed only "symbolic." Modern nativism can only operate on a symbolic level.537 Language is a trait easily manipulated for the as-


537. Because of changes in constitutional and statutory law in recent decades, modern nativism can proceed only along certain limited avenues. For instance, the Supreme Court declared that any law that classifies by race or national origin will be subject to strict judicial scrutiny. See Korematsu v. United States, 323 U.S. 214, 216 (1944). Moreover, Congress rejected the national origins quota system in 1965 as discriminatory. See supra note 418 and accompanying text. Thus, because direct restrictions on Hispanic immigration and voting violate the law, advocates of official English have resorted to seeking legislation that ties restrictions to a trait that is a close proxy for national
servation of political status and control. The English language is a crucial symbol of the ethnicity of America's dominant core culture. Official English laws thus use the language symbol to assert and enforce the dominance of the core culture and to marginalize all other American cultures. Hence, on a symbolic level, the debate about an "official" language (and the concomitant creation of "unofficial," un-American languages) is, at its core, a debate about cultural and political dominance and power.538

Current official English laws symbolize the rejection of this nation's Hispanic heritage and culture, a heritage legal history amply bears out.539 This heritage predates the English in some areas of the United States and remains vitally alive.540 Official English laws symbolize the rejection of the other non-core cultures of recent immigrants and Native Americans. Proof of the nativist meaning of the official English symbol lies in the history of the movement and in the distress, anger, and threat its proponents express in response to the mere presence


538. See Moran, Status Conflict, supra note 329, at 321, 341, 345-50. Indeed, "the official designation of language has been used by those in control of the decision-making machinery as a means of political manipulation and control. . . . [L]anguage is primarily a means of control." Leibowitz, supra note 461, at 449; see also Torres, supra note 537, at 1051 ("Law does not stand outside the process of legitimization, for it is both producer and product of the dominant social culture. Legal culture and institutions are, indeed, the clearest articulations of the reigning social vision and, thus, are important elements in the function of both popular beliefs about commonplace relationships and popular acquiescence to the existing distribution of social goods and power.").

539. Many commentators assert that the official English movement is anti-Hispanic and anti-Asian in character. See, e.g., Califa, supra note 401, at 293, 294-95, 320; James Crawford, What's Behind Official English?, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, supra note 400, at 171, 171-77; Fishman, supra note 161, at 125, 132-34; Tom McArthur, Comment: Worried about something else, 60 INT'L J. SOC. LANGUAGE 87, 90-91 (1986); Camilo Perez-Bustillo, What Happens When English Only Comes to Town? A Case Study of Lowell, Massachusetts, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, supra note 400, at 194, 194-201; Comment, supra note 33, at 522-23. See generally 11 CHICANO-LATINO L. REV. (1991) (collecting articles identifying the pervasiveness of discrimination that English-only legislation and policies produce).

540. The oldest city in the United States is St. Augustine, Florida, established in 1565, prior to Jamestown, which was not established until 1607. See Amy Bushnell, The Noble and Loyal City 1565-1668, in THE OLDEST CITY: ST. AUGUSTINE, SAGA OF SURVIVAL 28, 28-29 (Jean P. Waterbury ed., 1983).
of several languages on voting ballots. The animating premise of the official English movement is that Hispanic people, and their language, do not belong within the concept of what is American. The movement's demand for disenfranchisement, its rejection of Spanish and other American languages for voting purposes, sends a powerful message of rejection and exclusion to certain segments of the American citizenry, defined by national origin. It is a familiar message of rejection experienced by unpopular groups in this society.\textsuperscript{541} This message, targeted principally at Hispanics, and the resulting discouragement of non-English-speaking citizens from voting, constitutes a serious defect in the political process of the kind that merits heightened judicial scrutiny.\textsuperscript{542}

Part of the offensive symbolism of the official English movement is that the differing prestige values of Spanish and English would be given further legal sanction upon the enactment of a constitutional amendment or statute declaring English the official language. Official English laws create an explicit cultural dividing line between official-language discourse, with its correspondingly greater status, and unofficial-language discourse, with correspondingly lesser status. Although these status relationships exist now, albeit in implicit form, official English would enlarge the crucial governmental arena for English-language discourse and consequently reduce this arena for other languages.

Official English laws violate the principle of equal citizenship thought to be at the core of the Equal Protection Clause. As Professor Kenneth Karst writes, "under that principle, every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat people as members of an inferior or dependent caste, or as nonparticipants."\textsuperscript{543} Just as state endorsement of religion creates classes of insiders and outsiders, so do official language laws. Courts should recognize this inequality and sub-

\textsuperscript{541} See Leibowitz, \textit{supra} note 461, at 463 (explaining how language restrictions and other discriminatory legislation against "alien" groups result from hostility and adversely affect such groups).

\textsuperscript{542} See \textit{JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW} 153 (1980) (asserting that courts should treat as suspect those classifications that "disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure"); Lawrence, \textit{supra} note 536, at 469-70.

\textsuperscript{543} Karst, \textit{supra} note 36, at 1.
ject official English laws to heightened scrutiny. 544

Official English laws, therefore, in any form create inequality. To the extent that they classify citizens by language, a close proxy for national origin, they merit heightened scrutiny. To the extent they are motivated by anti-Hispanic and anti-Asian nativist sentiment, their motivation is unconstitutional. To the extent these laws are “symbolic,” they are symbolic of the wrong things. They are symbolic of nativist hatred directed toward peoples whose language, and often color, differ from those of the dominant culture. They reinforce the dominant culture, at the expense of marginalizing America’s other cultures. 545

CONCLUSION

Legal history demonstrates that many American languages have co-existed within these borders. In certain states, languages like Spanish, French, and German had legal parity with English. With the hindsight that history provides, it is apparent that different languages have never threatened the unity of the nation. Indeed, even if one accepts the assumption that other languages somehow threaten the dominance of English, then the threat to English is currently at its minimum point, given the unprecedented domestic and international prestige and influence the English language holds.

Language standardization offends principles of individual liberty at the core of our culture. During early English history, movements to standardize language were thought to be inconsistent with “the genius of a free nation.” 546 A similarly broad conception of individual liberty shaped the views of some of the Framers, particularly Jefferson and Rush. To a large extent, the uniqueness of American society and the interdependence and intermingling of our peoples, as foreseen by Chief Justice

544. For a discussion of how courts should apply heightened scrutiny and thus invalidate official English laws, see Califa, supra note 401, at 330-43. Official English laws may also violate the First Amendment. Laws which seek to limit public discourse to English have a silencing and chilling effect upon the speech of bilingual, or monolingual, Spanish-speaking public employees. In Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990), the federal district court applied this rationale to hold Arizona’s official English law unconstitutionally overbroad.

545. My arguments about the unconstitutionality of official English laws are directed only at these laws. I do not take the position that all government regulation of language is unconstitutional or undesirable.

546. See supra note 50 and accompanying text.
Marshall, have rendered national language standardization unnecessary. A strong case can be made, then, that language standardization, as considered by the Framers or in current form, as proposed by the official English movement, offends principles of individual liberty recognized by the Framers.

It is perhaps for these reasons that proposals for language standardization on the federal level have never been accepted. John Adams's initial proposal for a national language academy never emerged from Congress. The later attempt to create a private academy failed after only a few years. Such proposals were contrary to our spirit of liberty. Similarly, current proposals for national language standardization such as official English would seem to stand little chance of success. We should recognize, as some Framers did, that language choice is properly, in substantial part, beyond the control of national government.

The historical record shows that the national government has generally avoided the standardization of English, or its imposition as an official language. The principal exception appears to be the English language requirements in our immigration laws. Avoiding the adoption of an official language beyond what already exists appears to be the best stance for the federal government with respect to language. This position is most consistent with principles of liberty recognized by the Framers and in substantive due process decisions of the Supreme Court. To the extent that the federal government has recognized linguistic diversity, chiefly in the Bilingual Education Act and the 1975 amendments to the Voting Rights Act, it has provided opportunities for, or required, localities with substantial linguistic minorities to accommodate those minorities.

The history set forth in this article demonstrates that debates about America's different languages and cultures have always been a prominent feature of our political landscape.

547. See BARON, supra note 18, at 179 ("As it has been in the past, such state and local nativism tends to be blocked at the federal level."). But see id. at 191 (asserting that the federal English-only amendment has some chance of success because linguistic discrimination remains publicly acceptable in the United States).

548. See supra text accompanying notes 350-52.

549. The imposition of linguistic conformity through official language laws, rather than fostering unity, might engender hostility and social unrest. See BARON, supra note 18, at 180.

550. See discussion supra part III.

551. See supra note 474.
These debates often have been about the tension between tolerance of cultural pluralism and the demand for conformity. The history demonstrates that America, during times of national stress, has been frightened of its own who differ from the core culture. During these times, America seeks to reinforce the identity of its core culture through the law, creating a climate in which the traits of certain Americans are deemed "foreign." History also demonstrates the manipulation of language as a national symbol, and the expression of American nativism through laws restricting the languages and cultures of Americans whose culture differs from the core culture.

The official English movement appears to be, then, another round in the "dialectic of plurality and conformism," the paradox generated by the fact of American cultural pluralism confronted with the demand for conformity to the ethnic traits of America's core culture. The demand of official English is the demand for national identity through linguistic homogeneity, a homogeneity that has never existed in America's people. It is a demand for unity based on conformity, a demand clearly at odds with the fact of American pluralism and core principles of American liberty.

Our country, and its government, must include all who belong. This article has demonstrated that many cultures and languages belong to America, even if the nation as a whole has failed to recognize that fact. Cultural pluralism, therefore, need not lead to distrust. To disenfranchise Americans, or to exclude Americans "symbolically" because of the language they speak, is an old wrong of exclusion. Rather than repeat this wrong, we must expand the concept of "American" such that it includes the full measure, linguistic, racial, and cultural, of Americans.

To the extent that the history set forth in this article has been unknown, it is because the stories many historians have told about our history and American identity have been incomplete. To the extent that this history surprises, it is because our concept of American identity has been too narrow. To the extent that this history helps expand our sense of who belongs within the American polity, and to the extent that we can accept and act upon this expanded sense, there will be less room for the inequality bred of nativism.