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# Constitutional Clash: When English-Only Meets Voting Rights

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CONSTITUTIONAL CLASH: WHEN ENGLISH-ONLY MEETS VOTING RIGHTS

*Michael A. Zuckerman\**

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INTRODUCTION

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An ironic tension exists between politicians and an increasingly influential block of potential voters. During the 2008 election, Barack Obama and John McCain appealed to Hispanic voters by campaigning in Spanish,<sup>1</sup> yet states like Iowa prevented those very same voters from registering to vote in any language other than English.<sup>2</sup> This is the new American reality, where the Spanish-speaking electorate is expanding rapidly as calls for forced assimilation and closed borders grow louder. One consequence of this has been the rise of English-only legislation in a number of states. One state in particular, Iowa, made national headlines last year when a state court in *King v. Mauro* interpreted its English-only statute to prevent the Iowa Secretary of State from providing non-English voter registration forms.<sup>3</sup> As a result, eligible voters in Iowa who did not speak English were hindered from registering to vote in state and national elections.<sup>4</sup>

Legislative efforts, like Iowa's, to restrict state communications to English are not new. Indeed, this debate has raged on since the founding of our nation. Although early attempts to establish a national language were rejected, politicians have continued to push language legislation since that time. The World War I era, for instance, saw the rise of state bans on

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<sup>1</sup> See, e.g., Jim Rutenberg, *In Spanish, McCain Criticizes Obama on Immigration*, N.Y. TIMES, Sept. 15, 2008. According to the *New York Times*, the candidates spent over \$3 million on Spanish language advertising. See generally New York Times Election Guide 2008, Issue: Spanish, available at <http://elections.nytimes.com/2008/president/advertising/issues/1454spanish>.

<sup>2</sup> See, e.g. *English-only Ruling for Voters Draws Fire in Iowa*, CBSNEWS.COM, Apr. 10, 2008, <http://www.cbsnews.com/stories/2008/04/10/politics/ewire/main4007930.shtml>; William Petroski & Nigel Duara, *Judge Puts English Only on Voter Forms*, DES MOINES REGISTER, Apr. 4, 2007.

<sup>3</sup> See *King v. Mauro*, No. CV6739, slip at 29-30 (Iowa Dist. Ct. for Polk County, Mar. 31, 2008) (rejecting state and federal constitutional challenges to Iowa's English-only law).

<sup>4</sup> For an example of this idea, see Lisa Friedman, *Bilingual Ballot Fate Debated*, DAILY NEWS (L.A.), June 14, 2006, at N4 (reporting on the story of Senator Feinstein's mother's difficulty understanding English ballot initiatives). This idea is supported by empirical research. See Sandra Guerra, Note, *Voting Rights and the Constitution: The Disenfranchisement of Non English Speaking Citizens*, 97 YALE L.J. 1419, 1430-31 (1988).

teaching of foreign languages. Similarly the modern English-only movement has focused on establishing English as the official language of the United States and restricting government communications accordingly. To date, nearly 30 states have passed English language legislation, although many of these measures are merely symbolic and the courts have limited their scope.

Using Iowa as a backdrop, this Article explores the constitutional vulnerability of English-only laws when states apply these laws to voting. The purpose of this piece is not to argue that English-only laws are facially unconstitutional; rather, it aims to chronicle the recent application of English-only laws to voting and provide the legal foundation that practitioner and plaintiffs may use to overturn these laws as applied to voting. It considers complex and uncertain areas of constitutional law, detailing how one might argue that English-only laws violate the U.S. Constitution and the federal Voting Rights Act.

To that end, Part I provides a brief overview of the English-only movement. It considers the history and status of language in the United States, language legislation, and significant court decisions that have informed the English-only debate. Part II turns to the Iowa English Language Reaffirmation Act. Specifically, it provides an overview of the Act, and then describes how one Iowa court, in *King v. Mauro*, recently interpreted this law to enjoin state officials from distributing non-English voter registration materials. Using Iowa as a backdrop, Part III argues that English-only legislation is legally suspect when applied to voting. It details the strongest arguments that can be marshaled against the constitutionality of laws like the Iowa English Language Reaffirmation Act.

## I. THE ENGLISH-ONLY MOVEMENT

The battle over the status of language in the United States is “as old as the United States itself.”<sup>5</sup> To date, the United States still does not have an official language.<sup>6</sup> Early attempts to create an official language were often rebuked by Congress,<sup>7</sup> with some, such as Abraham Lincoln, arguing that adopting a national language would be an infringement upon individual liberty.<sup>8</sup> Notwithstanding the failure of the nation to adopt an official language, periods of anti-immigrant sentiment in our history have given rise to legislative attempts to promote English as the official national language.<sup>9</sup> In the 1880s, for instance, Illinois and Wisconsin passed laws restricting public school instruction to English.<sup>10</sup> Similarly, in 1896, the government of Hawaii declared English to be the language of its school system.<sup>11</sup>

Indeed, the period running from the late 19th century until World War I saw the rise of “latent xenophobia” and the associated rise of English-only legislation.<sup>12</sup> This is best seen through the wave of anti-German sentiment that led many states to ban the teaching of foreign

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<sup>5</sup> Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 669 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 295 (1992).

<sup>8</sup> Mark. L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 U. OR. L. REV. 849, 855 (1995).

<sup>9</sup> Hill, *supra* note 5, at 670. For instance, President Roosevelt is reported to have said: “We have room for but one language in this country, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house.” Adeno Addis, *Constitutionalizing Deliberative Democracy in Multilingual Societies*, 25 BERKLEY J. INT’L L. 117, 143 n.105 (2007) (internal citation omitted)

<sup>10</sup> REBECCA DIANE FREEMAN, *BILINGUAL EDUCATION AND SOCIAL CHANGE* 35 (1998).

<sup>11</sup> Puerto Rico and the Philippines similarly established English as their official language during this time period. See DENNIS E. BARON, *THE ENGLISH-ONLY QUESTION* 152 (1992).

<sup>12</sup> Jocelyn Friedrichs Benson, *Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy*, 48 B.C. L. REV. 251 (2007); see also Note, “Official English”: *Federal Limits on the Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1349 (1987) [hereinafter “Official English”].

languages.<sup>13</sup> The *Minneapolis Tribune*, for instance, advocated in 1918: “Pass a law prohibiting every language but American in our schools . . . and then enforce it.”<sup>14</sup> Twenty-one states followed its advice. The Supreme Court limited these laws, however, in two famous cases that restricted the scope of English-only efforts. In *Meyer v. Nebraska*<sup>15</sup> and *Farrington v. Tokushige*,<sup>16</sup> the Court made clear that a state cannot ban the teaching of foreign languages; this would be an infringement of protected liberty under the Due Process Clause. Nonetheless, hostility towards foreigners led to a renewed push to promote English during World War II,<sup>17</sup> although the civil rights movement, especially the passage of the Voting Rights Act, helped language minorities to more fully participate in civil society.<sup>18</sup>

The modern English-only movement began in 1981 with U.S. Senator Hayakawa’s unsuccessful introduction of an amendment to the U.S. Constitution to make English the official language of the United States.<sup>19</sup> To date, approximately 30 U.S. states have declared English to be its official language,<sup>20</sup> and the U.S. Congress continues to consider bills to do the same.<sup>21</sup> A recent article notes that English-only legislation generally takes three forms: (1) statutes that

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<sup>13</sup> Hill et al., *supra* note 5, at 670-71.

<sup>14</sup> JON GJERDE, *THE MINDS OF THE WEST: ETHNOCULTURAL EVOLUTION IN THE RURAL MIDDLE WEST* 322 (1999).

<sup>15</sup> 262 U.S. 380 (1923).

<sup>16</sup> 273 U.S. 284 (1927).

<sup>17</sup> See SANDRA DEL VALLE, *LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES* 30-31 (2003).

<sup>18</sup> The Voting Rights Act explicitly applies to language minorities. See discussion *infra* Part III.

<sup>19</sup> See Hill, *supra* note 5, at 674 (citing Marla B. Somerstein, Comment, *Official Language A, B, Cs: Why the Canadian Experience with Official Languages Does not Support Augments to Declare English the Official Language of the United States*, 38 U. MIAMI. INTER-AM. L. REV. 251, 260 (2006)).

<sup>20</sup> See, e.g., “States with Official English Laws,” U.S. English, Inc., <http://www.usenglish.org/view/13> (last visited October 2, 2009); 5 Ill. Comp. Stat. Ann 460/20 (West 2005) (“The official language of the State of Illinois is English.”); *Governor’s Signature Makes English the Official Language of Kansas*, BUS. WIRE, May 11, 2007.

<sup>21</sup> See, e.g., *Senate Embraces English-only Amendment*, POLITICO.COM, Mar. 13, 2008, [http://www.politico.com/blogs/thecrypt/0308/Senate\\_embraces\\_Englishonly\\_amendment.html](http://www.politico.com/blogs/thecrypt/0308/Senate_embraces_Englishonly_amendment.html)

restrict government communications to only English; (2) statutes that require English, but are less restrictive than the first category and carry a measure of symbolic significance; and (3) purely symbolic statutes that declare English to be the official language, similar to the designation of a state flower.<sup>22</sup> Just recently the quiet-Midwestern farm state of Iowa became ground zero in the fight over language rights when a state court upheld its English-only law and applied it to voter registration materials.

The relative success of the modern-day English-only movement, as seen by the passage of English-only laws in a majority of states, has not been without judicial oversight. Apart from the early Supreme Court cases discussed above, various courts have significantly limited the reach of many English language legislation. In a landmark case, the California Supreme Court in 1970 struck down the state's English literacy requirement for voting as a violation of the Equal Protection Clause by impermissibly infringing upon the fundamental right to participate in the political process. Decades later, the Arizona Supreme Court reached a similar result when it overturned that state's law, which required the state government to act only in English.<sup>23</sup> The court reasoned that such a requirement would impermissibly burden the First Amendment rights of state employees, as well as infringe upon the fundamental right of citizens to seek redress from their state government.<sup>24</sup> The Supreme Court of Alaska reached a similar holding on First Amendment grounds,<sup>25</sup> while the Oklahoma Supreme Court did so on similar state law grounds.<sup>26</sup>

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<sup>22</sup> See Hill et al, *supra* note 5, at 673-74.

<sup>23</sup> Ruiz v. Hall, 191 Ariz. 441, 460-61 (1998) (quoting language of the state statute).

<sup>24</sup> *Id.*

<sup>25</sup> Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007).

<sup>26</sup> *In re Initiative Petition*, No. 366, 46 P.3d 123 (Okla. 2002) (holding that the state English-only law violated, *inter alia*, the state's constitutional protections of freedom of speech and petition for redress of grievances).

## II. *KING v. MAURO*: THE IOWA ENGLISH LANGUAGE REAFFIRMATION ACT

Discussion of the recent controversy over English in Iowa begins with the state's passage of the Iowa Language Reaffirmation Act (ILRA).<sup>27</sup> Signed into law by Governor Tom Vilsack in 2002, the Act declares English "to be the official language of the state of Iowa."<sup>28</sup> To that end, it mandates that "the English language shall be the language of government in Iowa." The Act explains that this means "[a]ll official documents, regulations, orders, transactions, proceedings, programs, meetings, publications, or actions taken or issued [by the state] shall be in the English language."<sup>29</sup> The stated legislative purpose of the Act is to encourage proficiency in English, thereby promoting civic and economic participation in society.<sup>30</sup> Indeed, although the Governor recognized that the legislation was not without controversy, he implied that enacting the English-only bill would improve the lives of children in Iowa.<sup>31</sup>

The Act does, however, contain important exceptions to its English-only requirement for state government communications.<sup>32</sup> The exceptions seem to be geared toward insulating the Act from constitutional attack. For instance, the Act provides that the "English only requirements shall not apply to" the teaching of languages;<sup>33</sup> "[a]ctions, documents, or policies necessary for trade, tourism, or commerce;"<sup>34</sup> "[a]ctions or documents that protect the rights of

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<sup>27</sup> IOWA CODE § 1.18 (2007).

<sup>28</sup> *Id.* § 1.18(c)(2).

<sup>29</sup> *Id.* § 1.18(3).

<sup>30</sup> *Id.*

<sup>31</sup> *Iowa Governor Signs Bill Declaring English State's Official Language*, Mar. 1, 2002, FOXNEWS.COM, <http://www.foxnews.com/story/0,2933,46948,00.html>.

<sup>32</sup> *See* IOWA CODE § 1.18(4).

<sup>33</sup> This provision was likely included to comply with the Supreme Court's rulings in *Meyer v. Nebraska*, 262 U.S. 380 (1923), and *Farrington v. Tokushige*, 273 U.S. 284 (1927), which together significantly limited the power of the states to ban the teaching of foreign languages.

<sup>34</sup> This provision was likely included to ensure that the Act did not violate the Commerce Clause, which places limits on the power of states to affect interstate commerce. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Indeed, Iowa has familiarity with the dormant Commerce



victims of crimes of criminal defendant;”<sup>35</sup> and “[a]ny language usage required by or necessary to secure the rights guaranteed by the Constitution and laws of the United States of America or the Constitution of the State of Iowa.”<sup>36</sup> Another section of the Act provides that the Act “shall not be construed” to, among other things, prohibit a state official from communicating in a language other than English “if that [state official] deems it necessary or desirable to do so.”<sup>37</sup>

The roots of the recent controversy in Iowa can be traced back to 2003 when then-Iowa Secretary of State Chester Culver made non-English voter registration forms available online.<sup>38</sup> By 2006, the forms were available in at least four languages: Spanish, Vietnamese, Laotian, and Bosnian.<sup>39</sup> As the 2008 election approached, a number of individuals and groups, including U.S. Congressman Steve King and English Only Inc.,<sup>40</sup> brought a lawsuit in Iowa state court contending that the non-English voter registration forms violate the ILRA. The Iowa Secretary of State defended its action by arguing that (1) its action did not violate the text of the statute; (2) even if it did violate the statute’s prohibition, it falls into one of the statute’s exceptions; and (3) the Act is unconstitutional.<sup>41</sup>

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Clause. *See, e.g.,* Kassel v. Consolidated Freightways Corp., 450 U.S, 662 (1981) (holding that an Iowa statute restricting the length of certain trucks on its highways violated the Commerce Clause).

<sup>35</sup> This provision was likely included to protect the Due Process rights of criminal defendants.

<sup>36</sup> *See* IOWA CODE § 1.18(4).

<sup>37</sup> *Id.* § 1.18(5). Two additional exceptions in subsection 5 relate to the preservation of Native American languages, and discouraging persons from learning or speaking English.

<sup>38</sup> King v. Mauro, No. CV6739, slip at 29-30 (Iowa Dist. Ct. for Polk County, Mar. 31, 2008).

<sup>39</sup> *Id.*

<sup>40</sup> The other plaintiffs were Iowa County Auditors Scott Reneker, Joni Ernst, Judy Howrey, and Karen Strawn; Iowa Senators Paul McKinley, Jerry Behn, and Ralph Watts; Ngu Alons, a citizen of Iowa; and U.S English Only, Inc., an interest organization “dedicated to preserving the unifying role of the English Language in the United States.” *Id.* at 5.

<sup>41</sup> *Id.* at 18.

After deciding the threshold issue of standing,<sup>42</sup> the Court held that the state’s provision of ballots in languages other than English violates the ILRA. The Court began by interpreting the text of the statute, concluding that its plain language restricts government communications to *only* English.<sup>43</sup> Moreover, the Court reasoned, even if the language of the statute were ambiguous, interpreting the Act to allow communications to be in languages other than English would frustrate the stated purpose of the Act, which is to encourage citizens to become proficient in English.<sup>44</sup> Having determined that the text of the Act precluded communication in languages other than English, the Court next held that the non-English voter registration forms did not fall within the exceptions to the Act.<sup>45</sup> Although subsection 5 permits state officials to use languages other than English if it is “necessary or desirable,” the Court reasoned that sustaining the practice of providing non-English voter registration forms on this ground would “allow this exception to swallow the rule.”<sup>46</sup>

Moving beyond statutory interpretation, the Court then addressed the constitutionality of the Act. Proceeding with a presumption of constitutionality, the Court held that the Act withstands constitutional scrutiny under the First Amendment to the U.S. Constitution.<sup>47</sup> It distinguished cases in other states that struck down English-only laws on the grounds that these laws were more sweeping in their prohibitions of using English.<sup>48</sup> Moreover, it also set aside the

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<sup>42</sup> *Id.* at 6-16.

<sup>43</sup> *Id.* at 19 (interpreting IOWA CODE § 1.18(3)).

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 20-22

<sup>46</sup> *Id.* at 21.

<sup>47</sup> The Court notes that Respondents assert that the Act violates the equal protection rights of both government actors and citizens. The Court, however, declined to decide the issue, instead confining its analysis to the First Amendment. *Id.* at 26.

<sup>48</sup> *Id.* at 24 (“The laws involved in these cases were construed to prohibit all government communications, both written and oral, by all members of the government, in any language other than English when conducting both official and unofficial state business, thereby imposing

issue of the right of citizens to receive important information from the government,<sup>49</sup> instead focusing on “whether the government may require that all official government documents (in this case, voter registration forms) be printed in English and no other languages.”<sup>50</sup> In this regard, based on its reading of U.S. Supreme Court precedent, the Court held “that the State of Iowa may control its message by requiring that its official documents be printed only in the English language.”

Interestingly, after upholding the constitutionality of the Act, the Court in *dicta* noted that providing multi-lingual voter registration forms might be upheld under an exception to the Act that allows “[a]ny language usage required by or necessary to secure the rights guaranteed by the Constitution and laws of the United States . . . .”<sup>51</sup> In this regard, the Court suggested that the federal Voting Rights Act, applicable through the exception quoted above, might require Iowa’s use of non-English voter registration forms.<sup>52</sup> But because the parties did not raise this issue, the Court neither decided it nor engaged in an extensive discussion of its merits.

### III. CONSTITUTIONAL VULNERABILITY OF ENGLISH-ONLY AS APPLIED TO VOTING

State English-only laws raise significant legal concerns, sounding in both constitutional and federal statutory law. Although English-only laws may be constitutionally suspect on their face, the constitutional and federal statutory concerns became more pronounced when states apply these laws to voting. To that end, this Part explores the claims that a plaintiff might assert

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substantial if not complete communication barriers between the government and language minorities.”) (citing, *inter alia*, *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 194-95 (Alaska 2007)).

<sup>49</sup> *See id.* at 26.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 29 (quoting IOWA CODE § 1.18(4)(h)).

<sup>52</sup> *Id.* at 29-30 (citing 42 U.S.C. § 1973(a) (2006); *Hernandez v. Woodward*, 714 F. Supp. 963, 967 (N.D. Ill. 1989)).

against English-only laws as applied to voting. The Part proceeds by discussing three major provisions under which English-only laws are vulnerable: the Fourteenth Amendment, the Fifteenth Amendment, and the federal Voting Rights Act. It also discusses the foundational issue of standing.

#### A. Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>53</sup> This Amendment was ratified in the aftermath of the Civil War to permit broader federal to combat discrimination on the state-level.<sup>54</sup> The Supreme Court has interpreted this language to allow two types of claims: (1) those based on impermissible classifications; (2) those based on the burdening of fundamental rights.<sup>55</sup>

To adjudicate equal protection claims, the Court employs three tiers of judicial scrutiny.<sup>56</sup> The most searching review is strict scrutiny, which requires the state to prove that the challenged action is narrowly tailored to achieve a compelling state interest.<sup>57</sup> Courts apply this standard to state action that burdens fundamental rights, or discriminates based on, for example, race and national origin.<sup>58</sup> Since strict scrutiny places a high burden on the state, plaintiffs most often prevail under this standard.<sup>59</sup> The next standard of review is intermediate scrutiny, which

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<sup>53</sup> U.S. CONST. amend XIV, sec. 1.

<sup>54</sup> See Surell Brady, *A Failure of Judicial Review of Racial Discrimination Claims in Criminal Cases*, 52 SYRACUSE L. R. 735, 756-57 (2002).

<sup>55</sup> See, e.g., *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985).

<sup>56</sup> See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 668, 671-72 (3d ed. 2006).

<sup>57</sup> See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005).

<sup>58</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 591 n.6 (1996).

<sup>59</sup> See *id.* But this is not always the case. See, e.g., *Gratz v. Bollinger*, 538 U.S. 244 (2003) (upholding University of Michigan’s admissions system under strict scrutiny, finding that campus diversity is compelling interest); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment policies during World War II).

requires the state to prove that the challenged action is substantially related to an important state interest.<sup>60</sup> Courts generally reserve this category of scrutiny for gender-based discrimination.<sup>61</sup> Most other challenges to the constitutionality of state law is evaluated under the rational-basis standard. Under this most forgiving tier of scrutiny, the burden is on the plaintiff to prove that the challenged action is not rationally related to a legitimate state interest.<sup>62</sup>

### 1. Classification-Based Equal Protection

The Equal Protection Clause generally permits states to treat certain persons differently so long as the state action is rationally related to a legitimate state interest.<sup>63</sup> If the state classifies on the basis of an inherently suspect class, however, the classification is met with scrutiny.<sup>64</sup> As discussed above, the Supreme Court has recognized certain classifications as inherently suspect, such as those based on race, national origin, and religion.<sup>65</sup> Beyond inherently suspect classifications, the Court has also recognized quasi-suspect classifications, including those based on gender.<sup>66</sup>

In the absence of an explicit classification, facially neutral state action that has a disparate impact on a suspect class violates the Equal Protection Clause only if the state intends to discriminate against that suspect class.<sup>67</sup> Indeed, the Supreme Court has noted, “official action

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<sup>60</sup> *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>61</sup> *See id.* Note that more recently the Supreme Court has required an “exceedingly persuasive justification” in cases of alleged gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 524 (1996).

<sup>62</sup> *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82 (2000).

<sup>63</sup> *See City of Dallas v. Stanglin*, 490 U.S. 19 (1989)

<sup>64</sup> *See, e.g.*, *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

<sup>65</sup> *Id.*

<sup>66</sup> *E.g.*, *United States v. Virginia*, 518 U.S. at 524.

<sup>67</sup> *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 240 (1976) (“The invidious quality of the law must be traced to a racially discriminative purpose.”); *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (striking down California law that allowed unfettered discretion in private real estate transactions because it was “intended to authorize, and does authorize, racial discrimination in the housing market.”).

will not be held unconstitutional solely because it results in a racially disproportionate impact.”<sup>68</sup> In determining the intent of the law, courts will consider the totality of the circumstances, including disparate impact, legislative history and patterns,<sup>69</sup> and whether the law is “unexplainable on grounds other than race.”<sup>70</sup>

Here, English-only laws do not likely amount to a facial classification.<sup>71</sup> By their express terms, English-only laws, such as Iowa’s, do not single out any group, nor do they treat any identifiable group of registered voters any differently than any other.<sup>72</sup> Accordingly, because the laws are facially neutral, a plaintiff must show an intent to discriminate against a suspect class to subject the laws to heightened scrutiny—otherwise rational basis review will apply.<sup>73</sup>

Two plausible arguments exist to subject facially neutral English-only laws to heightened scrutiny. First, plaintiffs may argue that the state intended to discriminate based on race and/or national origin by using language as a proxy for race and/or national origin. Second, plaintiffs might argue that the state intended to discriminate based on language, and that action should be met with intermediate or strict judicial scrutiny because language should be treated as a separate suspect classification.

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<sup>68</sup> *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 264-65 (1977) (citing *Davis*, 426 U.S. at 242). The discriminatory purpose may also be found in the uneven application of a facially neutral law. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating facially neutral law prohibiting dry cleans from operating with a permit because the law was applied with “an evil eye and an uneven hand” to discriminate against persons of Chinese descent).

<sup>69</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (considering racist attitudes at the state constitutional convention as circumstantial evidence of intent to discriminate).

<sup>70</sup> *Metro. Housing Dev.*, 429 U.S. at 266; see also *Rogers v. Lodge*, 458 U.S. 613 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>71</sup> See *Smothers v. Benitez*, 806 F. Supp 299, 308 n.17 (D.P.R. 1992) (citing Note, ‘Official English’: Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 HARV. L. REV. 1345, 1357 (1987) (“A policy of monolingualism does not explicitly ‘classify’ persons: all are given ‘equal’ services (in English), and no distinctions are overly drawn between individuals.”)).

<sup>72</sup> See IOWA CODE § 1.18 (2007).

<sup>73</sup> *Metro. Housing Dev.*, 429 U.S. at 264-65.

a. Language as a Proxy for Race and/or National Origin

Plaintiffs might argue that the enactment of English-only laws amounts to intentional discrimination based on race or national origin because the state is using language as a proxy for race and/or national origin.<sup>74</sup> Although the U.S. Supreme Court left has open the question whether language-based classifications amount to classifications based on national origin,<sup>75</sup> plaintiffs may rely on Supreme Court *dicta* about the close relationship between language and race.<sup>76</sup> In *Hernandez v. New York*,<sup>77</sup> for instance, a defendant argued that a prosecutor's exercise of peremptory challenges against two Spanish-speaking jurors amounted to striking the jurors based on race.<sup>78</sup> The trial court denied the claim, accepting the prosecutor's race-neutral reasons for striking the jurors.<sup>79</sup> Although the Supreme Court affirmed—giving deference to the trial court's finding of fact—the Court noted the possible high correlation between race and language, and that striking based on language might be evidence of intent to discriminate based on race. As the Supreme Court stated, “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.”<sup>80</sup>

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<sup>74</sup> See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995) (“Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment.”), *vacated as moot* 520 U.S. 413 (1997); *Asian Am. Bus. Group v. City of Pomona*, 716 F.Supp. 1328, 1332 (C.D. Cal. 1989) (holding that restrictions applicable only to signs written in foreign languages amounts to discrimination based on national origin). *Cf.* *Rice v. Cayeto*, 528 U.S. 495, 512 (2000) (finding a Fifteenth Amendment violation because a state restriction on the right to vote based on Hawaiian ancestry was a proxy for race).

<sup>75</sup> See *Hernandez v. New York*, 500 U.S. 353, 369-70 (1991); *Kikumura v. Turner*, 28 F.3d 592, 900 (7th Cir. 1994); *Moua v. City of Chico*, 324 F.Supp.2d 1132, 1137-40 (E.D. Cal 2004).

<sup>76</sup> See *Hernandez*, 500 U.S. 353.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 355, 360.

<sup>79</sup> *Id.* at 358.

<sup>80</sup> *Id.* at 371.

To further bolster a claim of intentional discrimination, plaintiffs should argue that the totality of the “facts and circumstances behind the law[s]”<sup>81</sup> evince an intent to discriminate based on race and/or national origin.<sup>82</sup> Plaintiffs would undoubtedly look to the legislative history of the laws as well as their disparate impact on a cognizable racial and/or national origin group.<sup>83</sup> Moreover, to the extent the national immigration debate has often taken on racial dimensions, this is probative of an intent to discriminate based on race and/or national origin.<sup>84</sup> Furthermore, the fact of a state applying its English-only policies to voter registration is independently suspect because the state is affecting voting rights, which are fundamental,<sup>85</sup> and have historically been used as a tool for discrimination.<sup>86</sup> With this background, plaintiffs in Iowa, for instance, may argue that since Iowa requires its voters to be U.S. citizens,<sup>87</sup> requiring voter registration forms to be in English serves no other purpose except to discriminate.

#### b. Language as a Suspect Classification

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<sup>81</sup> See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

<sup>82</sup> See *Davis*, 426 U.S. at 238-45.

<sup>83</sup> Cf. *Yniguez*, 69 F.3d at 947 (opining that the burden of Arizona’s English-only law “falls almost entirely upon Hispanics and other national origin minorities,” thus raising equal protection concerns). As one scholar notes, the language minority “portion of the electorate is growing while, at the same time, the barriers to the ballot facing non-English-speaking populations show little sign of decreasing.” Benson, *supra* note 12, at 269.

<sup>84</sup> See, e.g., Massimo Calabresi, *Is Racism Fueling the Immigration Debate?*, TIME, May 17, 2006.

<sup>85</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>86</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 311-12 (1966). Cf. *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (considering history of voting-related discrimination in vote dilution inquiry). Against this historical backdrop of discrimination, the affirmative withdrawal of multi-lingual voter registration forms like Iowa did in 2008, rather than merely refusing to provide voter registration in other languages, should be met with skepticism.

<sup>87</sup> See “Qualifications to Vote in Iowa,” Iowa County Auditors, [http://www.iowaauditors.org/voter\\_registration/qualifications.html](http://www.iowaauditors.org/voter_registration/qualifications.html).



In addition to arguing that English-only laws intentionally discriminate based on race and/or national origin, plaintiffs should invite the court to expand the boundaries of traditionally protected groups.<sup>88</sup> Indeed, the Supreme Court has expressly left open the door to expanding the boundaries of protected classes.<sup>89</sup> To that end, plaintiffs should argue that language is an independent suspect classification, and thus any intent to discriminate based on language should be met with heightened judicial scrutiny. In support of this contention, plaintiffs may argue that they show the “traditional indicia of suspectness,” because they are “saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>90</sup>

A leading case supporting the designation of language as an independent suspect class is *Olagues v. Russoniello*,<sup>91</sup> where the Ninth Circuit applied strict scrutiny to a government investigation into voter fraud that targeted non-English speakers who requested bilingual ballots.<sup>92</sup> In applying strict scrutiny, the Court considered traditional indicia of suspectness displayed by language-minorities, congressional findings on language discrimination, and the close link between nationality and language.<sup>93</sup> Ultimately, the Court held that three characteristics—foreign-born voter, recently registered voter, and bilingual ballot voter—

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<sup>88</sup> See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (opining “community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection [as those groups defined by race and color].”).

<sup>89</sup> *Id.*

<sup>90</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see also *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938). Although courts sometimes look to immutability as another indicia of suspectness, see *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973), it is not determinative, see *Olagues v. Russoniello*, 797 F.2d 1511, 1520 (9th Cir. 1986), and some argue that language is effectively immutable. See, e.g., *Official English*, *supra* note 11.

<sup>91</sup> 797 F.2d at 1520.

<sup>92</sup> *Id.* at 1520.

<sup>93</sup> *Id.* at 1520-22.

combined to “form a class that has the traditional indicia of a suspect classification based on race and national origin.”<sup>94</sup>

## 2. Fundamental Rights Strand of Equal Protection (First Amendment)

Independent of any suspect class determination, state action may trigger strict scrutiny under the Equal Protection Clause if it infringes upon a fundamental right.<sup>95</sup> In this regard, the strongest attacks on English-only statutes under this theory allege that the statutes burden the exercise of the fundamental right to vote and fundamental right to petition the government under the First Amendment.<sup>96</sup> Both of these rights are guaranteed by the First Amendment and recognized by Supreme Court case law.<sup>97</sup> Although First Amendment claims may be asserted under the Equal Protection Clause, constitutional attack under the First Amendment directly would achieve the same result,<sup>98</sup> and perhaps would be a stronger basis.<sup>99</sup> Nonetheless, the Equal Protection Clause provides a sound basis for constitutional attack, and this analysis provides a framework for a First Amendment attack as well.

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<sup>94</sup> *Id.* at 1522. To the extent some cases appear to be at odds with *Olagues*, see, e.g., *Sobreal Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Moua v. City of Chico*, 324 F.Supp.2d 1132, 1139 (E.D.Cal. 2004), these cases are readily distinguishable from a state like Iowa’s withdrawal of non-English voting materials because in the former cases, plaintiffs were seeking an affirmative equal protection right to in certain languages, and in the latter case, plaintiffs were seeking relief from an affirmative denial of election materials that had been previously provided.

<sup>95</sup> See, e.g., *Player v. Doe*, 457 U.S. 202, 217 n.15 (1982); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

<sup>96</sup> See, e.g., *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007); *In re Initiative Petition*, No. 366, 46 P.3d 123 (Okla. 2002); *Ruiz v. Hall*, 191 Ariz. 441 (1998); *Castro v. State*, 2 Cal.3d 223 (1970).

<sup>97</sup> See, e.g., *United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217, 222 (1967) (opining that the right to petition for redress of grievances is at the heart of the Bill of Rights)

<sup>98</sup> See, e.g., *Kritz*, 170 P.3d 183.

<sup>99</sup> See RONALD D. ROTUNDA & JOHN E. NOVAK, *TREATISE OF CONSTITUTIONAL LAW* §18.40 (“It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights.”).

Plaintiffs may argue that English-only laws, like Iowa’s statute, substantially burden their fundamental right to vote,<sup>100</sup> and generally prevent them from fully exercising their First Amendment right to petition the government.<sup>101</sup> By erecting a language barrier between eligible voters and exercise of the franchise, the state blocks an effective outlet for speech and petition for redress of grievances.<sup>102</sup> Further, because the burden of a statute like Iowa’s likely falls unequally on an identifiable group of individuals, such as Latinos, it discriminates against voting members of that group because their political voices are blunted by the state in violation of the First and Fourteenth Amendments.<sup>103</sup> Moreover, these laws diminish non-English speaking voters’ ability to seek effective redress in the political process because it burdens their right to vote, which is one of the most essential tools of change.<sup>104</sup> Indeed, since voting rights are “fundamental,” and voters must be given an equally effective voice in the political process, English-only voter registration forms operate to abridge this fundamental right and deprive an identifiable group of the right to effective participation in both state and federal elections.<sup>105</sup>

Although case law is somewhat scant in this area, and the Supreme Court has been largely silent on the issue of English-only laws, two state supreme court cases support a

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<sup>100</sup> See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”)

<sup>101</sup> See U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>102</sup> See, e.g., *In re Initiative Petition No. 366*, 46 P.3d 123 (Okla. 2002) (holding that state English-only law violated state constitutional rights to speech and petition for redress of grievances).

<sup>103</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

<sup>104</sup> See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (recognizing fundamental interest in participating in state “elections on an equal basis with other citizens in the jurisdiction.”).

<sup>105</sup> See *Reynolds v. Sims*, 377 U.S. 533, 561-62.

fundamental rights-based equal protection claim against English-only laws. In *Ruiz v. Hall*, for instance, the Supreme Court of Arizona invalidated that state’s English-only law on equal protection grounds.<sup>106</sup> There, the Court struck down the law under strict scrutiny because it found that it impinged upon the plaintiffs’ “fundamental” First Amendment rights to petition the government and participate equally in the political process.<sup>107</sup> Similarly, in *Castro v. State*, the Supreme Court of California invalidated the provision of the state constitution that conditioned the right to vote on the ability to read English.<sup>108</sup> *Castro* focused its analysis on denial of equal access to the political process and the fundamental importance of the right to an effective vote.<sup>109</sup>

#### B. Fifteenth Amendment

The Fifteenth Amendment guarantees that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>110</sup> The Amendment, passed in the aftermath of the Civil War, was intended to “secure[] freedom from discrimination on account of race in matters affecting the franchise.”<sup>111</sup> Through the Amendment, the federal government sought to ensure that newly emancipated slaves had the electoral and political power to protect their new rights.<sup>112</sup>

Notwithstanding its unambiguous commitment to racial equality in voting, the Fifteenth Amendment did not immediately operate to prevent states from denying or abridging the right to

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<sup>106</sup> 191 Ariz. 441 (1998).

<sup>107</sup> *Id.* at 457.

<sup>108</sup> 2 Cal.3d 223 (1970).

<sup>109</sup> *Id.* at 234-38.

<sup>110</sup> U.S. CONST. amend. XV, Sec. 1.

<sup>111</sup> *Lane v. Wilson*, 307 U.S. 268, 274 (1939); *see also* *United States v. Reese*, 92 U.S. 214, 218 (1876) (“Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is.”).

<sup>112</sup> *Rice v. Cayeto*, 528 U.S. 495, 512 (2000).

vote in violation of the Amendment.<sup>113</sup> Federal courts eventually had to step in to invalidate many techniques that states used to circumscribe the Fifteenth Amendment, which included grandfather clauses,<sup>114</sup> white-only primaries,<sup>115</sup> racial gerrymanders,<sup>116</sup> and various “procedural hurdles.”<sup>117</sup> Today, although most race-based voting claims arise under the Fourteenth Amendment,<sup>118</sup> the Fifteenth Amendment continues stands as an effective bar against racial discrimination in voting.<sup>119</sup>

A Fifteenth Amendment violation requires the plaintiff to prove that (1) the state abridged or denied her right to vote, (2) the state intended to do so, (3) and this intent was on account of race, color, or previous condition of servitude.<sup>120</sup> This Part takes each element in detail.

By its express language, the Fifteenth Amendment applies to state action that “deni[es] or abridge[s]” the right to vote.<sup>121</sup> Accordingly, the Amendment applies not only to actual denial of the right, but also to practices that impair effective exercise of the franchise.<sup>122</sup> As the Supreme Court explained in *Lane v. Wilson*, the prohibition on abridgement “hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”<sup>123</sup> In *Gomillion v. Lightfoot*,<sup>124</sup> for

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<sup>113</sup> See *Rice*, 528 U.S. at 513; *South Carolina v. Katzenbach*, 383 U.S. 301, 311-12 (1966).

<sup>114</sup> See, e.g., *Myers v. Anderson*, 238 U.S. 368 (1915).

<sup>115</sup> See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953).

<sup>116</sup> See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>117</sup> See, e.g., *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating facially neutral voter registration scheme that had the practical impact of denying African-Americans the right to vote).

<sup>118</sup> See SAMUEL ISSACHROFF ET AL., *THE LAW OF DEMOCRACY* 808 (2nd ed. 2007).

<sup>119</sup> *Rice v. Cayeto*, 528 U.S. 495 (2000) (relying on Fifteenth Amendment to invalidate aspect of state election system)

<sup>120</sup> See U.S. CONST. amend XV; *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality).

<sup>121</sup> U.S. CONST. amend XV.

<sup>122</sup> This is the abridgement prong of the Fifteenth Amendment. See *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

<sup>123</sup> *Id.*

instance, the Supreme Court found a Fifteenth Amendment violation where city altered its political boundaries to exclude almost all African-Americans from its electorate.<sup>125</sup> More recently, the Court suggested that a state does not violate the Fifteenth Amendment so long as its minority citizens can “register and vote without hindrance.”<sup>126</sup>

Beyond a denial or abridgment of the right to vote, a violation of the Fifteenth Amendment also requires the state to intent to do so on account of race, color, or previous condition of servitude.<sup>127</sup> Although the requirement of intent is not found in the text of the Amendment, the Supreme Court in *City of Mobile* read this requirement into both the Fourteenth and Fifteenth Amendments.<sup>128</sup>

Furthermore, the intent to deny or abridge the right to vote must be “on account of race, color, or previous condition of servitude.”<sup>129</sup> Because the Fifteenth Amendment protects persons of all race,<sup>130</sup> state action that intends to deny or abridge the voting rights of members of *any race* is subject to Fifteenth Amendment scrutiny.<sup>131</sup> In recent years, the Court has shown some willingness to find a Fifteenth Amendment violation in the absence of a denial or abridgment

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<sup>124</sup> 364 U.S. 339 (1960),

<sup>125</sup> *Id.* at 346-48.

<sup>126</sup> *See Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334 n.3 (2000) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality)). Although subsequent case law does not further define “hindrance,” courts often use the word “hinder” in the context of vote dilution claims under Section 2 of the Voting Rights Act. In determining whether a jurisdiction has violated Section 2, courts look to the totality of the circumstances, including “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which *hinder* their ability to participate in the political process.” *Thornburg v. Gingles*, 478 U.S. 30, 37 (quoting S. REP. NO 97-417 (1982) (emphasis added)).

<sup>127</sup> *See City of Mobile*, 446 U.S. at 61 (“Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”).

<sup>128</sup> *See, e.g., Mixon v. State of Ohio*, 193 F.3d 389, 407 (6th Cir. 1999).

<sup>129</sup> U.S. CONST. amend. XV.

<sup>130</sup> *Rice v. Cayeto*, 528 U.S. 495, 512.

<sup>131</sup> *Id.*

explicitly based upon race.<sup>132</sup> In *Rice v. Cayeto*, the Court struck down a Hawaii state statute that limited voting for the Office of Hawaiian Affairs to those persons statutorily defined as “native Hawaiian.”<sup>133</sup> The Court reasoned that ancestry served as a “proxy” for race and that the state “has used ancestry as a racial definition and for a racial purpose.”<sup>134</sup> Because only a homogeneous group of native decedents fit into the statutorily defined category of “native Hawaiian,” the state “enact[ed] a race-based voting qualification” in violation of the Fifteenth Amendment.<sup>135</sup>

Here, because most states guarantee the right to vote to all U.S. citizens within their borders,<sup>136</sup> English-only laws as applied to voting materials do not generally *deny* the right to vote to any class of voters.<sup>137</sup> Therefore, plaintiffs should argue that the English-only laws *abridged* their right to vote because requiring voters to fill out form only available in a language other than their native language may “effectively handicap [their] exercise of the franchise . . . although the abstract right to vote may remain unrestricted as to race.”<sup>138</sup> Even if the state offers translators to assist voters in completing materials, it is unmistakable that requiring a non-English speaker to fill out an English form as a condition to vote operates to abridge the right to vote. The extent of abridgement, however, can only be revealed after investigation into the realities on the ground in particular communities.

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 514.

<sup>134</sup> *Id.* at 514.

<sup>135</sup> *Id.* at 517.

<sup>136</sup> *See, e.g.*, Iowa Secretary of State, <http://www.sos.state.ia.us/elections/voterreg/voterguidefiles/RegInfo.html>

<sup>137</sup> *Cf. Terry v. Adams*, 345 U.S. 461 (1953).

<sup>138</sup> *See Lane v. Wilson*, 307 U.S. 268, 275 (1939); *see also Bossier Parish School Bd.*, 528 U.S. at 334 n.3 (citation omitted). *Cf. Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (suggesting in the context of the VRA that English-only policies can be challenged as a denial of the right to vote).

Even if English-only laws as applied to voting abridge the voting rights of language minorities, the difficulty lies in proving that this abridgement was on account of race or color. As discussed in the Fourteenth Amendment context,<sup>139</sup> English-only laws are generally facially neutral—the laws do not explicitly abridge the right to vote of any identifiable racial group. By looking to the totality of the circumstances, however, plaintiffs make smoke out a discriminatory intent through, for instance, the legislative history of the laws and their disparate impact on a cognizable racial group, including history and disparate impact.<sup>140</sup> Although states might purport to be motivated by respect for the English language by enacting English-only laws, when applied to voting, the laws are at best overbroad because they shut out eligible voters from the political process. Indeed, hindering the exercise of the franchise undercuts the assimilation of immigrants that English-only supports seek to promote. By impairing the exercise of the franchise, states, like Iowa, effectively block eligible voters who do not speak English from directly influencing government policy.<sup>141</sup> Moreover, plaintiffs can also argue that the state intended to discriminate against them based on language, where language is a proxy for race. As discussed with regard to Equal Protection, although the Supreme Court has not recognized “language minorities” as a suspect class, nor language as a proxy for race, the Court in *Hernandez* implied that language might be a proxy for race,<sup>142</sup> and much case law exists to support this notion.<sup>143</sup>

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<sup>139</sup> See *supra* Part III.A.

<sup>140</sup> Cf. *Washington v. Davis*, 426 U.S. 229, 238-245 (1976) (holding that disparate impact of a facially neutral law is relevant to, but not sufficient to establish, intent for purposes of a Fourteenth Amendment claim); see *supra* Part III.A.

<sup>141</sup> This arguably exacerbates the already low voter turnout among language minorities. See generally Benson, *supra* note 12, at 264-69 (describing examples of low voter participation among language minorities).

<sup>142</sup> See *Hernandez v. New York*, 500 U.S. 353 (1991).

<sup>143</sup> See, e.g., *Olagues v. Russoniello*, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (applying strict scrutiny to government investigation into voter fraud that targeted non-English speakers who



In the end, combining *Hernandez*<sup>144</sup> with *Rice*,<sup>145</sup> Plaintiffs can argue that laws like Iowa’s abridged their right to vote on account of race.<sup>146</sup> Depending on the facts of the case, plaintiffs may show that non-English speaking U.S. citizens in a certain jurisdiction tend to be of a certain race, similar to *Rice* where ancestry served as a proxy for a homogenous racial group.<sup>147</sup> Whether this argument prevails, depends on the demographic characteristics of state enacting the English-only laws, the individual circumstances of the plaintiff, and—perhaps most significantly—a court’s willingness to embrace the dicta of *Hernandez* and/or extend the holding of *Rice* to abridgment in a facially neutral context.

### C. Voting Rights Act

The Voting Rights Act of 1965 (“VRA”) represents “Congress’ firm intention to rid the country of racial discrimination in voting.”<sup>148</sup> In signing the bill into law, President Johnson proclaimed that the VRA is “one of the most monumental laws in the entire history of American freedom.”<sup>149</sup> Although many of the provisions of the VRA apply only jurisdictions that meet a

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requested bilingual ballots); *Smothers v. Benitez*, 806 F.Supp. 299 (D.P.R. 1992) (denying summary judgment for defendant on equal protection claim against English-only examination because motivations for test were unclear); *Asian Am. Bus. Group v. City of Panama*, 716 F.Supp. 1328 (C.D.Cal. 1989) (holding that restrictions applicable only to signs written in Foreign languages amounts to discrimination based on national origin). *But see, e.g.*, *Sobreal Perez v. Heckler*, 717 F.2d 36, 41-43 (2d Cir. 1983) (holding that failure to provide human services form in Spanish did not violate equal protection because no intent to discriminate); *Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir. 1975) (upholding civil service test offered only in English because no suspect class was at issue); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1139 (E.D.Cal. 2004) (rejecting equal protection claim for failure to provide interpretation services because plaintiffs failed to show intent to discriminate).

<sup>144</sup> 500 U.S. 353 (1991).

<sup>145</sup> 528 U.S. at 512 (2000).

<sup>146</sup> *See* U.S. CONST. amend. XV.

<sup>147</sup> *Rice*, 528 U.S. at 512; *see also Hernandez*, 500 U.S. at 371.

<sup>148</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

<sup>149</sup> SAMUEL ISSACHROFF ET AL., *THE LAW OF DEMOCRACY* 461 (2nd ed. 2007). For extensive background on the Voting Rights Act, see generally Richard M. Valelly, *The Voting Rights Act: Securing the Ballot* (2005).

specific statutory coverage formula,<sup>150</sup> other VRA provisions are generally applicable throughout the nation.<sup>151</sup> The coverage requirement originally sought to apply to those jurisdictions with a history of racial discrimination, but Congress has subsequently amended coverage to address the “problems of ‘language minority groups.’”<sup>152</sup>

Many sections of the VRA are applicable only to jurisdictions that meet a certain statutory triggering formula. Specifically, Sections 4(f)(4) and 203(c) of the VRA extend coverage to jurisdictions meeting certain language minority criterion.<sup>153</sup> Sections 4(f)(4) and 203(c), although distinct, operate in a similar manner. In short, jurisdictions covered by these sections must take affirmative steps to prevent discrimination against language minorities.

To the extent a jurisdiction is covered, it must then take affirmative steps to provide materials in “the language of the applicable minority group.”<sup>154</sup>

Other sections apply more generally. Section of the VRA, Section 2, for example, states in relevant part: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote . . . in contravention of the guarantees set forth in section 1973b(f)(2) of

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<sup>150</sup> See, e.g., Voting Rights Act §§ 4(b), 5. For additional background on the coverage requirement, see generally *About Language Minority Voting Rights*, U.S. Department of Justice, Civil Rights Division, Voting Section, [http://www.usdoj.gov/crt/voting/sec\\_203/activ\\_203.htm](http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm).

<sup>151</sup> See, e.g., *id.* § 5.

<sup>152</sup> See S. REP. NO. 94-295, at 37-38 (1975) (recognizing a “systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English.”). Note that while the VRA has a limited duration, Congress has extended its life many times. See *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. \_\_\_\_ (2009).

<sup>153</sup> See generally Benson, *supra* note 12, at 284-94.

<sup>154</sup> See, e.g., 42 U.S.C. § 1793aa-1(a)(c) (2006). Note that a plaintiff cannot state a claim against Iowa under any section of the Voting Rights Act that requires coverage, including Sections 4(f)(4) and 203(c). Neither the State of Iowa, nor any of its political subdivisions, are covered jurisdictions for purposes of the Voting Rights Act. See 7 Fed. Reg. 48871-77 (2002) (listing covered jurisdictions).

this title . . . .”<sup>155</sup> As the above text indicates, Section 2 expressly proscribes states from denying or abridging the right to vote on account of “guarantees set forth in section 1973(b)(f)(2).”<sup>156</sup> Section 1973(b)(f)(2), in turn, provides that “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a *language minority group*.”<sup>157</sup> Thus, Section 2 directly proscribes voting procedures that result in the denial or abridgment of the right to vote of language minorities. Accordingly, a state’s failure to provide language minorities with equal access to registration opportunities may violate the general non-discrimination requirement of Section 2, notwithstanding coverage requirements found elsewhere in the VRA.<sup>158</sup> To make out a violation of Section 2, the plaintiff may rely on the totality of the circumstances to show that the electoral process is “not equally open to participation” by a class of protected persons in 1973(a), which includes, by reference to 1973b(f)(2), language minorities.<sup>159</sup>

Here, a plaintiff has two options to allege a violation of the VRA. First, if the plaintiff lives in a jurisdiction that meets certain statutory triggering conditions based on demographics, then the plaintiff is entitled to certain language accommodations.<sup>160</sup> Second, even if plaintiffs are unable to state a claim under the language minority provisions of the VRA, plaintiffs may still

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<sup>155</sup> 42 U.S.C. § 1973(a).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (emphasis added).

<sup>158</sup> *See, e.g., Hernandez v. Woodard*, 714 F.Supp. 963, 969 (N.D. Ill. 1989) (holding that plaintiff language minorities may state a claim under Section 2 even though they do not meet the triggering requirements of the language minority-specific sections of the VRA); James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195, 219 (2006).

<sup>159</sup> *See* 42 U.S.C. § 1973(b).

<sup>160</sup> *See* 7 Fed. Reg. 48871-77 (2002) (listing covered jurisdictions).

state a claim under Section 2 of the VRA, which applies nationwide.<sup>161</sup> An Iowa state court suggested as much when dismissing a challenge to Iowa’s English-only law.<sup>162</sup> To that end, plaintiffs should argue that laws like Iowa’s operate as a “prerequisite to voting or standard, practice, or procedure” that abridges the voting rights of language-minorities in contravention of 42 U.S.C. §§ 1973(a), 1973(b)(f)(2). Similar to a Fifteenth Amendment abridgement claim,<sup>163</sup> requiring voters to fill out a registration form only available in a language other than their native language may “effectively handicap [their] exercise of the franchise . . . .”<sup>164</sup> Although plaintiffs must show intent to discriminate in the Fourteenth and Fifteenth Amendment contexts,<sup>165</sup> no such showing is required for a Section 2 claim.<sup>166</sup> Rather, plaintiffs may rely on the totality of the circumstances, including contemporary hostility to language minorities, to show the voting in Iowa is “not equally open to participation” by language minorities.<sup>167</sup> This is a much stronger claim.

#### D. Standing Issues

Standing is central to any action brought in federal court. The concept of standing is derived from Article III of the U.S. Constitution, which restricts the federal judicial power to

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<sup>161</sup> See *Hernandez*, 714 F. Supp at 969.

<sup>162</sup> See *King v. Mauro*, No. CV6739, slip at 29-30 (Iowa Dist. Ct. for Polk County, Mar. 31, 2008) (rejecting state and federal constitutional challenges to Iowa’s English-only law).

<sup>163</sup> For a discussion of the Fifteenth Amendment, see *supra* Part III.B.

<sup>164</sup> *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

<sup>165</sup> See, e.g., *Mixon v. State of Ohio*, 193 F.3d 389, 407 (6th Cir. 1999).

<sup>166</sup> See 42 U.S.C. § 1973(a). Note, however, that some question the constitutionality of Section 2 of the Voting Rights Act. Because congressional authority to pass the Voting Rights Act is derived from the Fourteenth and Fifteenth Amendments, which both require intent to discriminate, it remains unclear whether Congress can do away with the intent requirement through Section 2. See generally SAMUEL ISSACHROFF ET AL., *THE LAW OF DEMOCRACY* 700-11 (2nd ed. 2007) (describing both sides of the debate).

<sup>167</sup> 42 U.S.C. § 1973(b); see also *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (listing factors within the totality of the circumstance to find vote delusion).

“cases or controversies.”<sup>168</sup> The Supreme Court has interpreted this limitation to require litigants to have standing,<sup>169</sup> meaning a sufficient interest in the case to merit judicial review. In *Lujan v. Defenders of Wildlife*,<sup>170</sup> the Court laid out the three elements of Article III standing. *First*, the plaintiff must have suffered an “injury in fact” to a legally protected interest.<sup>171</sup> That injury must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>172</sup> Although the Court’s concept of injury is broad,<sup>173</sup> a plaintiff must take care to allege a direct injury to the plaintiff, not a generalized grievance.<sup>174</sup> In the equal protection context, the “injury in fact” is the “denial of equal treatment” resulting from the challenged state action.<sup>175</sup> As a result, a plaintiff need not be unable to obtain a certain benefit to have standing to challenge a statute under the Equal Protection Clause.<sup>176</sup> *Second*, a “causal connection” must exist between the plaintiff’s alleged injury and the conduct alleged to be wrongful.<sup>177</sup> *Third*, it must be

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<sup>168</sup> U.S. CONST. art. III.

<sup>169</sup> *E.g.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that the party invoking federal jurisdiction has the burden to establish standing).

<sup>170</sup> 504 U.S. 555 (1992).

<sup>171</sup> *Id.* at 560.

<sup>172</sup> *Id.* at 560 (citation omitted).

<sup>173</sup> *See id.* at 562-63 (“Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniable a cognizable interest for purposes of standing”)

<sup>174</sup> *Id.* at 573-74 (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”).

<sup>175</sup> *See* *Northeastern Florida Chapter of Associated Genl Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993) (holding that plaintiffs had standing to challenge city contracting policy even though plaintiffs had not alleged that they would have received a contract but-for this allegedly discriminatory policy).

<sup>176</sup> *See id.* (“When the governments erects a barrier that makes it more difficult for members of one group to obtain a benefit that it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establishing standing.”).

<sup>177</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”) (citation omitted).

“‘likely, as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>178</sup>

Within this framework, this piece considers the standing of four potential plaintiffs who may challenge the application of English-only laws to voting materials. The first is a plaintiff who registered to vote in English but wanted her native tongue (“Plaintiff #1”); the second is a plaintiff who wanted to register to vote, but did not because she was unable to understand English and the ballot was not offered in her native tongue (“Plaintiff #2”); the third is a plaintiff who asked for but was denied a registration form in any language other than English and did not register (“Plaintiff #3”); and fourth is a plaintiff who coordinates voter registration efforts and was denied use of registration form in languages other than English for those who ask for it (“Plaintiff #4”).

As a preliminary matter, to the extent Plaintiffs #1, 2, and 3 allege unequal treatment based on language, race, and/or national origin, all three would likely have standing to do so under the Equal Protection Clause. This is because the Supreme Court has made clear that a denial of “equal treatment” forms the basis of an equal protection claim, not an inability to obtain a certain benefit.<sup>179</sup> As a result, a plaintiff need not be unable to obtain a certain benefit to have standing to challenge a statute under the Equal Protection Clause.<sup>180</sup>

With regard to Plaintiff #1, the “injury in fact” element of the standing inquiry is problematic. Because Plaintiff #1 is already registered to vote, it is difficult for her to allege that she suffered a cognizable injury. Indeed, Plaintiff #1 likely has full voting rights and cannot

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<sup>178</sup> *Id.* at 561 (citation omitted); *see also id.* at 568 (noting that injury was not redressible because the defendant did not have authority to change regulations at issue).

<sup>179</sup> *See City of Jacksonville*, 508 U.S. at 666.

<sup>180</sup> *See id.* (“When the governments erects a barrier that makes it more difficult for members of one group to obtain a benefit that it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establishing standing.”).

allege that the state is abridging or denying those rights. Once Plaintiff #1 registers, the injury no longer seems “concrete and particularized.”<sup>181</sup> Plaintiff #1 may, however, be able to argue that she was injured because she had to expend additional resources to register, such as hiring a translator or spending time to translate the form.<sup>182</sup> In any event, Plaintiff #1 must take care to allege a particularized harm,<sup>183</sup> rather than an allegation of discrimination against others who are not able to register in English; this seems like a generalized grievance, rather than a particularized injury,<sup>184</sup> or the assertion of rights of others not before the Court.<sup>185</sup> Assuming Plaintiff #1 can establish an “injury in fact,” the “causation” and “redressibility” prongs of standing should not pose significant obstacles. Enjoining the proper defendants from enforcement will redress any cognizable injury caused by the statute.

Plaintiff #2 likely has standing. Plaintiff #2 suffered an “injury in fact.” Because she wanted to register and Iowa prevented her from doing so, she has a “concrete and particularized” injury because she cannot participate in the election—the state abridged and denied her right to vote. This injury is not hypothetical because she planned to vote in the upcoming election but could not register.<sup>186</sup> Assuming “injury in fact,” Plaintiff #2 might run into a slight problem with causation. That is, did Plaintiff #2 cause her own injury by not attempting to register? To

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<sup>181</sup> *Cf. Lujan*, 504 U.S. at 561.

<sup>182</sup> *See, e.g., Olagues v. Russoniello*, 797 F.2d 1511, 1520 (9th Cir. 1986).

<sup>183</sup> In *Casaburro v. Volusia County Corp.*, No. 6:07-vc-56-ORL-KRS, 2008 WL 1771774 (M.D. Fla), a district court dismissed a Fifteenth Amendment and Voting Rights Act claim for lack of standing because plaintiffs failed to allege discrimination against them personally. *See id.* (noting that plaintiffs merely stated that “[a]bridgement occurs.”). Similarly, in *Olagues*, 770 F.2d at 797, the Court denied standing to a foreign-born, U.S. citizen who alleged Voting Rights Act violations because he was already registered and his claims were “focused on persons other than himself.”

<sup>184</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-74 (1992).

<sup>185</sup> *See Olagues*, 770 F.2d at 797.

<sup>186</sup> *Cf. Wamser*, 851 F.2d at 1048 (holding that an individual had standing because “she is not registered to vote and that her failure to register is fairly traceable to the Board’s refusal to make voter registration facilities more accessible and convenient to her and others like her.”).

address this concern, Plaintiff #2 should attempt to use or view the English materials. She might also talk to others about the form, or call the state to ask whether a non-English form is available. Plaintiff #2 might make herself knowledgeable about candidates and/or ballot initiatives.<sup>187</sup> Assuming the above is satisfied, enjoining the proper defendants from enforcement of the law will likely redress the injury caused by the statute.

Plaintiff #3 has the strongest case for standing. Similar to Plaintiff #2, Plaintiff #3 suffered an “injury in fact” because the state effectively shut her out of the electoral process.<sup>188</sup> The injury is much more pronounced in this fact-pattern because Plaintiff #3 demonstrated *her* intent to vote by asking for the form and the state affirmatively rejected this request. Note, however, that Plaintiff #3 should verify that she does not speak English well; if she does, then Plaintiff #3 might run into injury and/or causation problems. (That is, if Plaintiff #3 could just as easily and comfortably register in English, then the state may not be injuring her by blocking the non-English form). In any event, once Plaintiff #3 establishes that the statute injured her, it is likely that enjoining the proper defendants from enforcement of the law will likely redress the injury caused by the statute.

Turning to Plaintiff #4, the “injury in fact” element of the standing inquiry might be problematic. Because Plaintiff #4 is not alleging a denial or abridgment of its own voting rights, this might be seen as a generalized grievance. To that end, Plaintiff #4 must take care to

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<sup>187</sup> See *Castro v. State*, 2 Cal.3d 223 (1970).

<sup>188</sup> In *Coalition for Sensible and Humane Solutions v. Wamser*, 771 F.2d 395 (8th Cir. 1985), plaintiffs challenged the constitutionality of the Election Board’s refusal to appoint members of an organization to be deputy voter registrars or to sanction non-Board-sponsored voter registration drives. *Id.* at 398. The Court held the plaintiffs, both organizations and individuals, had standing to sue. The organization was injured because the Board’s inaction prevented it from registering new members. *Id.* at 399. The individual had standing because “she is not registered to vote and that her failure to register is fairly traceable to the Board’s refusal to make voter registration facilities more accessible and convenient to her and others like her.” *Id.* registration facilities more accessible and convenient to her and others like her.” *Id.*



affirmatively show that she (or it, in the case of a community-based organization) suffered an “injury in fact.” Plaintiff #4 could do this by showing, for example, that she has to spend extra time and money to register people to vote by hiring translators and additional staff.<sup>189</sup> This additional burden on Plaintiff #4 is especially injurious because Plaintiff #4 has limited resources and other important priorities. Moreover, Plaintiff #4 might argue that the statute discourages members from participating in community and civic educational opportunities, and generally undermines voter education and registration efforts.<sup>190</sup> Assuming Plaintiff #4 establishes that she suffered an “injury in fact,” it should be relatively easy for her to show that the injury was caused by the English-only requirement and that enjoining the proper defendants from enforcement of the statute will likely redress this injury.

#### CONCLUSION

As states like Iowa begin applying their English-only laws to fundamental areas of individual liberty such as voting, civil rights advocates must stand ready to challenge the constitutionality of these laws. Using Iowa as a background, this piece has attempted to expose the constitutional vulnerability of English-only laws as applied to voting. The piece provided an overview of recent developments in the law, and the legal foundation that practitioners and plaintiffs might use to combat these developments. By exploring complex and uncertain areas of

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<sup>189</sup> See *Olagues* 770 F.2d 791, 798 (holding that an organization had standing where it alleged that its “voter registration and educational efforts have been hindered as the direct result of the challenged investigation, in violation of the first amendment and associational rights [and] the investigation has discouraged members from participating in their associational activities and that it will lead to disclosure of organizational membership, thus undermining their voter education and registration efforts.”); *Nat’l Coalition for Students with Disabilities Educ. And Legal Defense Fund v. Scales*, 150 F.Supp.2d 845, 849-50 (D.Md 2001) (holding that plaintiff had standing to challenge state’s failure to comply with federal voter registration laws because such failure frustrates the goals of the organization—which is devoted in part to voter registration—and requires the organization to expend time and money on voter registration that would otherwise be expended in other ways).

<sup>190</sup> Cf. *Olagues*, 770 F.2d at 798.

constitutional law, it detailed how one may argue that English-only laws violate the Fourteenth and Fifteenth Amendments to the U.S. Constitution, as well as the Voting Rights Act. In the end, the nation has an important choice to make: encourage participation in the electoral process, or use voting rights as means to disenfranchise language minority citizens. If the nation continues down the latter path, civil rights lawyers must be ready to respond.