Constitutional Clash:  
When English-Only Meets Voting Rights

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INTRODUCTION

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,¹ yet states like Iowa prevented those very same voters from registering to vote in any language other than English.² This is the new American reality, where the Spanish-speaking electorate expands rapidly while calls for forced assimilation and closed borders also grow louder. One consequence of this changing reality has been the rise of English-only legislation in a number of states. One state in particular, Iowa, made national headlines last year when, in King v. Mauro, a state court interpreted its English-only statute to prevent the Iowa Secretary of State from providing non-English voter registration forms.³ As a result, eligible voters in Iowa who did not understand English were prevented from registering to vote in state and national elections.⁴

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4. 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 Dianne Feinstein’s mother’s difficulty with understanding English ballot initiatives). This idea is supported by empirical research. See Sandra Guerra, Note,
Legislative efforts to restrict state communications to English are not new. Indeed, this debate has raged 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 foreign language instruction. 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 thirty states have passed English language legislation, although many of these measures are merely symbolic—similar to designating a state flower—and the courts have limited their scope.

Using Iowa as a backdrop, this Essay explores the constitutional vulnerability of English-only laws when states apply these laws to voting. The purpose of this Essay 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 to claim that these laws are legally suspect as applied to voting. The Essay considers complex and uncertain areas of the law, detailing how one might argue that English-only laws violate the U.S. Constitution and the federal Voting Rights Act.

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 recently interpreted this law in *King v. Mauro* to enjoin state officials from distributing non-English voter registration materials. In light of the Iowa experience, Part III argues that English-only laws are legally suspect when applied to voting. It details the strongest arguments that can be marshaled against the constitutionality of laws such as 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.” The Constitution does not designate an official language for the nation, and, to this date, Congress has not designated an official language either. As one commentator notes: “The framers purposely did not give special recognition to English due to the connection between language and

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6. *Id.* at 673.
liberty.’” Early attempts to create an official language often were rebuked by Congress, but the debate over whether to adopt a national language has continued, with periods of anti-immigrant sentiment giving rise to increased legislative attempts to promote English as the official national language.

The period running from the late nineteenth century until World War I saw the rise of “latent xenophobia” and the associated rise of English-only legislation. This xenophobic tendency manifested most clearly through the wave of anti-German sentiment that led many states to ban the teaching of foreign languages. In the 1880s, for instance, Illinois and Wisconsin passed laws banning the use of German in public schools. Encouraged by these legislative successes, the Minneapolis Tribune advocated in 1918: “Pass a law prohibiting every language but American in our schools... and then enforce it.” Twenty-two states did just that.

10. Hill et al., supra note 5, at 670. For instance, President Theodore Roosevelt is reported to have said: “We have room for but one language here, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house.” Adeno Addis, Constitutionalizing Deliberative Democracy in Multilingual Societies, 25 Berkeley J. Int’l L. 117, 143 n.105 (2007) (citing S.I. Hayakawa, The Case for Official English, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 94, 100 (James Crawford ed., 1992)).
12. Id. at 260-61; 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”].
The Supreme Court limited these laws, however, in two famous cases that restricted the scope of English-only efforts. In *Meyer v. Nebraska* and *Farrington v. Tokushige*, the Court made clear that a state cannot ban the teaching of foreign languages, as doing so would infringe upon liberties protected by the Due Process Clause. Nonetheless, hostility toward foreigners led to a renewed push to promote English during World War II, including the passage of state laws prohibiting the use of foreign languages. Soon after, the War, the civil rights movement, and especially the passage of the Voting Rights Act, would help linguistic minorities to participate more fully in civil society.

The modern English-only movement began in 1981 with U.S. Senator S.I. Hayakawa's unsuccessful introduction of a constitutional amendment to make English the official language of the United States. To date, more than half of the U.S. states have declared English to be their official language, and Congress continues to consider bills to do the same at the federal level. A recent article notes that English-only legislation generally takes three forms: (1) statutes that restrict government communications to English only; (2) statutes that require English, but are less restrictive than the first category and carry a measure of symbolic significance; and (3) statutes that declare English to be the official language for purely symbolic purposes, analogous to state flower designations. 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 as applied to voter registration materials.

17. 262 U.S. 390 (1923).
20. Adams, supra note 7, at 862-63.
21. The Voting Rights Act explicitly applies to language minorities. See discussion infra Part III.
25. Hill et al., supra note 5, at 673-74.
The relative success of the contemporary 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 decisions have limited significantly the reach of English language legislation. In a landmark 1970 case, the California Supreme Court struck down the state's English literacy requirement for voting as a violation of the Equal Protection Clause for 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 a law requiring the state government to operate only in English. The court reasoned that such a requirement would impermissibly burden the First Amendment rights of state employees by restricting their speech, as well as infringe upon the fundamental right of citizens to seek redress from their state government. The Supreme Court of Alaska reached a similar holding on First Amendment grounds, while the Oklahoma Supreme Court did so on analogous state law grounds.

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 English Language Reaffirmation Act of 2009 (IELRA). Signed into law by Governor Tom Vilsack in 2002, the Act declares English “to be the official language of the state of Iowa.” The Act explains that this mandate means that “[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.” The stated purpose of the Act is to encourage proficiency in English, thereby promoting civic and economic participation in society. Although Governor Vilsack recognized that

27. See supra notes 17-18 and accompanying text.
30. Id.
32. In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002) (holding that the state’s English-only law violated, among other provisions, the state’s constitutional protections of freedom of speech and petition for redress of grievances).
33. IOWA CODE ANN. § 1.18 (West 2009).
34. Id. § 1.18(2).
35. Id. § 1.18(3).
36. Id. § 1.18(2).
the legislation was not without controversy, he implied that enacting the English-only bill would improve the lives of children in Iowa.  

The Act does, however, contain important exceptions to its English-only requirement for state government communications. 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,” actions, documents, or policies necessary for trade, tourism, or commerce; “actions or documents that protect the rights of victims of crimes or criminal defendants;” and “any 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.” Another section provides that the Act “shall not be construed” to, among other limitations, prohibit a state official from communicating in a language other than English “if that [state official] deems it necessary or desirable to do so.”

37. See Iowa Governor Signs Bill Declaring English State’s Official Language, FOXNEWS.COM, Mar. 1, 2002, http://www.foxnews.com/story/o,2933,46948,00.html (quoting Governor Vilsack as saying: “I recognize that the bill is not without controversy. . . . My hope is that we will look beyond the controversy and put politics behind us so we can focus on our commitments and responsibility to improve education for all our children.”).

38. See IOWA CODE ANN. § 1.18(5).

39. Id. § 1.18(5)(a). This provision was included most likely 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.

40. IOWA CODE ANN. § 1.18(5)(c). This provision probably was 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, 629 (1978) (striking down New Jersey’s prohibition on out-of-state trash shipments into the state, holding that a state may not solve legitimate public policy concerns by erecting barriers to trade). Indeed, the Iowa Legislature is familiar with the Dormant Commerce Clause. See, e.g., Kassel v. Consol. Freightways Corp., 450 U.S. 662, 663 (1981) (holding that an Iowa statute restricting the length of certain trucks on its highways violated the Commerce Clause).

41. IOWA CODE ANN. § 1.18(5)(f). This provision likely was included to account for the heightened due process protections afforded to criminal defendants. See Alan J. Croheim & Andrew J. Schwartz, Note, Non-English Speaking Persons in the Criminal Justice System: Current State of the Law, 61 CORNELL L. REV. 289, 296-97 (1975).

42. IOWA CODE ANN. § 1.18(5)(h).

43. Id. § 1.18(6)(a). Two additional exceptions in Subsection Six relate to the preservation of Native American languages and discouraging persons from learning or speaking English. Id. § 1.18(6)(b), (c).
CONSTITUTIONAL CLASH

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. By 2006, the forms were available in at least four languages: Spanish, Vietnamese, Laotian, and Bosnian. As the 2008 election approached, a number of individuals and groups, including U.S. Congressman Steve King, brought a lawsuit in Iowa state court contending that the non-English voter registration forms violated the IELRA. The Iowa Secretary of State defended his action by arguing as follows: (1) the registration forms did not contravene the text of the statute; (2) even if they did violate the statute’s prohibition, they fell into one of the statute’s exceptions; and (3) the Act is unconstitutional under the petitioner’s construction.

After deciding the threshold issue of standing, the court held that Iowa’s provision of ballots in languages other than English violated the IELRA. The court began by interpreting the text of the statute, concluding that its plain language restricts government communications only to English. Moreover, the court reasoned, even if the language of the statute were ambiguous, interpreting the Act to allow communications in languages other than English would frustrate the stated purpose of the Act: to encourage citizens to become proficient in English. 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 Act’s exceptions. Although Subsection Six permits state officials to use languages other than English if it is “necessary or desirable,” the court reasoned that sustaining the provision of non-English voter registration forms on this ground would “allow this exception to swallow the rule.”

45. Id. at 3-4.
46. The other plaintiffs were Iowa County Auditors Scott Reneker, Joni Ernst, Judy Howrey, and Karen Strawn; Iowa State 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 4-5.
47. Id. at 18.
48. Id. at 6-16.
49. Id. at 19 (interpreting IOWA CODE ANN. § 1.18(1) (West 2009)).
50. Id. at 20.
51. Id. at 21-22.
52. Id. at 21.

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The court then addressed the constitutionality of the Act, holding that it withstands scrutiny under the First Amendment to the U.S. Constitution.\textsuperscript{53} 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 mandating English usage.\textsuperscript{54} Moreover, it set aside the issue of citizens' rights to receive important information from the government,\textsuperscript{55} instead focusing on "whether the government may constitutionally require that official government documents [in this case, voter registration forms] be printed only in English."\textsuperscript{56} 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."\textsuperscript{57}

Interestingly, after upholding the constitutionality of the Act, the court noted in dicta that providing multilingual voter registration forms might survive judicial review 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 . . . ."\textsuperscript{58} 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.\textsuperscript{59} But because the parties did not raise this issue, the court neither decided on it nor engaged in an extensive discussion of its merits.

\begin{itemize}
\item \textsuperscript{53} The court noted that the respondents asserted that the Act violated 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. \textit{Id.} at 26.
\item \textsuperscript{54} \textit{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 substantial if not complete communication barriers between the government and language minorities.") (citing, among other cases, Alaskans for a Common Language, Inc. \textit{v.} Kritz, 170 P.3d 183, 194-95 (Alaska 2007)).
\item \textsuperscript{55} \textit{Id.} at 23 n.8 (noting that the Supreme Court "recognizes that First Amendment protection is afforded not only to the source of communication, but also its recipient.") (citing \textit{Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,} 425 U.S. 748, 756-57 (1976)).
\item \textsuperscript{56} \textit{Id.} at 23.
\item \textsuperscript{57} \textit{Id.} at 29.
\item \textsuperscript{58} \textit{Id.} (quoting \textit{IOWA CODE ANN.} § 1.18(5)(h) (West 2009)).
\end{itemize}
III. The Dubious Nature of English-Only Laws 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 become more pronounced when states apply these laws to voting. In light of these concerns, this Part explores the claims that a plaintiff might assert against English-only laws as applied to voting. The Part proceeds by discussing three sources of authority under which English-only laws are vulnerable: the Fourteenth Amendment, the Fifteenth Amendment, and the federal Voting Rights Act of 1965.

A. The 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."60 This Amendment was ratified in the aftermath of the Civil War to permit broader federal authority to combat discrimination on the state level.61 The Supreme Court has interpreted the language of the Amendment to allow two types of claims: those based on impermissible classifications and those based on the burdening of fundamental rights.62

In the equal protection context, the Court employs three tiers of judicial scrutiny.63 The most searching review is strict scrutiny, which requires the government to prove that the challenged action is narrowly tailored to achieve a compelling state interest.64 The Court applies this standard to state action that burdens fundamental rights or that discriminates based on certain characteristics, such as race, alienage, or national origin.65 Plaintiffs most often prevail under this standard, although the Roberts Court has cut back on plaintiffs' success in this legal sphere.66 The next standard of review is intermediate scrutiny, which requires the government to prove that the

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60. U.S. Const. amend XIV, § 1.
challenged action is substantially related to an important state interest. Most other challenges to the constitutionality of state laws are evaluated under the more lenient rational basis standard, under which the plaintiff must prove that the challenged action is not rationally related to a legitimate state interest.

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. If a state classifies on the basis of an inherently suspect class, however, the classification is met with strict scrutiny. As discussed above, the Supreme Court has recognized certain classifications as inherently suspect, such as those based on race, national origin, and religion. The Court has also recognized quasi-suspect classifications, including those based on gender.

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 a state intends to discriminate against that suspect class. That is, a state must intend specifically to discriminate against a suspect class—meaning that its purpose was to do so—in order for its action to be unconstitutional. Without proving intent, “[o]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”


71. Id.

72. E.g., 518 U.S. at 524.

73. See, e.g., Washington v. Davis, 426 U.S. 229, 240 (1976) (“[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (striking down a 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”).


75. Chavez v. Ill. State Police, 251 F.3d 612, 635-36 (7th Cir. 2001); Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001).

76. Vill. of Arlington Heights v. Metro. Housing Dev., 429 U.S. 252, 264-65 (1977) [hereinafter Arlington Heights] (citing Davis, 426 U.S. at 242). The discriminatory purpose may also be found in the uneven application of a facially neutral law. See,
impact, however, is not irrelevant to equal protection analysis; it is important circumstantial evidence of intent to discriminate. In determining the intent of the law, courts will consider the totality of the circumstances, including disparate impact, legislative history, and patterns of discrimination,77 as well as whether the law is "unexplainable on grounds other than race."78

Applying the above principles to English-only laws, such laws do not necessarily amount to a facial classification of different groups of individuals.79 By their express terms, English-only laws, like that of Iowa, restrict the use of non-English languages generally but do not single out any group, nor do they treat any identifiable group of registered voters differently than another.80 Indeed, English-only laws are careful not to mention race or national origin.81 The Iowa English Language Reaffirmation Act, for instance, merely states that "the English language shall be the language of government in Iowa" and that all government communications must generally only be in English.82 Because English-only laws are facially neutral, their constitutionality likely will turn on whether a challenger can show intent to discriminate against a suspect class.83 Such a showing will subject the laws to heightened scrutiny; otherwise rational basis review will apply.84 With this conclusion in mind, two plausible arguments exist to subject facially neutral English-only laws to heightened scrutiny.

First, English-only laws might amount to intentional discrimination based on race or national origin because the enacting state may be using language as a proxy for race or national origin.85 Such an argument would be grounded in the

e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (invalidating a facially neutral law prohibiting dry cleaners from operating with a permit because the law was applied with "an evil eye and an unequal hand" to discriminate against persons of Chinese descent).


79. See Smothers v. Benitez, 806 F. Supp. 299, 308 n.17 (D.P.R. 1992) ("A policy of monolingualism does not explicitly 'classify' persons: all are given 'equal' services (in English), and no distinctions are overtly drawn between individuals.") (quoting "Official English," supra note 12, at 1357).

80. See IOWA CODE ANN. § 1.18(3) (West 2009).

81. See, e.g., id.

82. Id. § 1.18(2), (3).

83. See infra notes 88-104 and accompanying text.


85. 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
Supreme Court’s decision in *Hernandez v. New York*. In that case, the petitioner argued that a prosecutor’s exercise of peremptory challenges against two Spanish-speaking jurors amounted to striking the jurors based on race. The trial court denied the claim, accepting the prosecutor’s race-neutral reasons for striking the jurors. Although the Supreme Court affirmed—deferring to the trial court’s finding of fact—the Court in dicta noted the possibly high correlation between race and language and suggested that striking jurors 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.” The Court went on to note that “a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found . . . to be a pretext for racial discrimination.”

Although *Hernandez* explicitly left open the question of whether language-based classifications amount to classifications based on national origin, the *Hernandez* decision supports in part the legal argument that language might be a proxy for race or national origin. Such an argument has had some success in lower federal courts since *Hernandez*, although only “relatively few cases” have

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87. *Id.* at 355, 360.
88. *Id.* at 358.
89. *Id.* at 372.
90. *Id.* at 371.
91. *Id.* at 371-72.
92. *Id.* at 369-71. Other cases have similarly left this question unanswered. See, e.g., Kikumura v. Turner, 28 F.3d 592, 599 (7th Cir. 1994) (“Whether classifications on the basis of language are to be treated as classifications on the basis of national origin is an unsettled question. There are exceedingly few Supreme Court opinions addressing the rights of language minorities, and the matter was expressly left open by the Court’s recent opinion in *Hernandez v. New York*.”) (citation omitted)); Moua v. City of Chico, 324 F. Supp. 2d 1132, 1137-38 (E.D. Cal. 2004).
93. See *Hernandez*, 500 U.S. at 371-72.
discussed language as a proxy for race or national origin. For example, the Sixth Circuit has held that comments by an employee's supervisor concerning the employee's accent were "direct evidence of national-origin discrimination." Similarly, a California federal district court held that city restrictions applicable only to signs written in foreign languages amounted to discrimination based on national origin. In that case, Asian American Business Group v. City of Pomona, the court reasoned that "a person's primary language is an important part of and flows from his/her national origin."

Yet, other courts have rejected the idea that language is a proxy for suspect characteristics, including one federal district court that rejected an equal protection claim when a city did not provide interpretation services. In that case, Moua v. City of Chico, the court reasoned that plaintiffs failed to demonstrate intent to discriminate on the basis of race or national origin. Other courts have declined to reach this question.

94. Moua, 324 F. Supp. 2d at 1137.
97. Id. at 1330.
98. See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36, 41-43 (2d Cir. 1983) (holding that a failure to provide human services forms in Spanish did not violate equal protection because there was no intent to discriminate); Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (upholding a civil service test offered only in English because no suspect class was affected). In addition to equal protection violations, the issue of language discrimination comes up in the Title VII employment context. See, e.g., Chimm v. Spring Branch Indep. Sch. Dist., No. H 09 3032, 2009 WL 5170214, at *3 (S.D. Tex. Dec. 18, 2009) ("[A] preference, or even requirement, that employees have bilingual ability does not give rise to a discrimination claim based on national origin or race."); Bayon v. State Univ. of N.Y. at Buffalo, No. 98 CV 0578E, 2004 WL 625133, at *2 (W.D.N.Y. Feb. 6, 2004) (noting that "command of the English language is a neutral criterion that does not discriminate on the basis of race or national origin"); Velasquez v. Goldwater Mem'l Hosp., 88 F. Supp. 2d 257, 262 (S.D.N.Y. 2000) ("Classification on the basis of language does not by itself identity members of a suspect class and would not support an inference of intentional national origin discrimination.") (internal quotation marks omitted).
100. See Trs. of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co., No. 05-70110, 2008 WL 724355, at *22 (E.D. Mich. Mar. 18, 2008) (declining to hold that language could be a proxy for national origin under a § 1981 claim in the absence of "a more pointed argument [by the plaintiff and] additional information on the characteristics and language abilities of the employees" in question); see also Colon v. Ill. Bell Tel. Co., No. 06 C 5214, 2009 WL 3147008, at *3 (N.D. Ill. Sept. 28, 2009) (noting that language "is at best a proxy for national
To the extent a court entertains an argument that language is being used as a proxy for race or national origin, the totality of the “facts and circumstances behind the law[s]” may evince the requisite intent to discriminate based on race or national origin. A challenger may further “smoke out” discriminatory intent by looking to the legislative history as well as any evidence of disparate impact on a cognizable racial or national origin group. Moreover, the racial overtones of the national immigration debate suggest a discriminatory intent behind English-only laws. Finally, a state merely applying its English-only policies to voter registration is independently suspect because the government implicates voting rights, which are fundamental and historically have been used as a tool for discrimination.

With this doctrine in mind, plaintiffs in Iowa for instance may argue that since Iowa requires its voters to be U.S. citizens, also requiring voter registration forms to be in English is probative of intent to discriminate. In other words, why make it more difficult for a U.S. citizen to vote when Iowa law expressly grants that citizen the right to vote under state law? Although the proponents of English-only laws might proffer seemingly legitimate reasons for the English-origin; it is not an automatic correlation,” yet declining to decide the question on a motion for summary judgment).


102. See Yniguez v. Arizonans for Official English, 69 F.3d 920, 947-48 (9th Cir. 1995) (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 11, at 269.


105. 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 the history of voting-related discrimination in its vote dilution inquiry). Against this historical backdrop of discrimination, the affirmative withdrawal of multilingual voter registration forms as in Iowa before the 2008 election—rather than merely refusing to provide voter registration in other languages—should be met with skepticism.

only law as applied to voting, such as promoting English language knowledge, voting rights are a dangerous context in which to promote such policies because they may cut off citizens from their right to vote.

Second, apart from the idea that English-only laws use language as a proxy for race or national origin, English-only laws would be vulnerable if a court were to expand the boundaries of traditionally protected groups to include linguistic minorities as a suspect class. Such an argument is not implausible, as the Supreme Court has stated that "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]."

With this authoritative statement in hand, courts may properly find that language is an independent suspect classification and thus that any intent to discriminate based on language should be met with heightened judicial scrutiny. To make the strongest case, a proponent of this idea must argue successfully that linguistic minorities 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."

A leading case supporting the designation of language as an independent suspect class is Olagues v. Russoniello, in which the Ninth Circuit applied strict scrutiny to a government investigation into voter fraud that targeted non-English speakers requesting bilingual ballots. In applying strict scrutiny, the court considered traditional indicia of suspectness displayed by linguistic minorities, congressional findings on language discrimination, and the close link between nationality and language. Ultimately, the court held that three


110. 797 F.2d 1511 (9th Cir. 1986), vacated on other grounds, 484 U.S. 806 (1987).

111. Id. at 1520.

112. Id. at 1520-22.
characteristics—being a foreign-born voter, being a recently registered voter, and being a bilingual ballot voter—combined to “form a class that has the traditional indicia of a suspect classification based on race and national origin.”

2. The Fundamental Rights Strand of Equal Protection: The 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. The strongest attacks on English-only statutes under this theory allege that the laws burden the fundamental right to vote and the fundamental right to petition the government under the First Amendment. Both of these rights are guaranteed by the First Amendment and recognized by the Supreme Court. Although First Amendment claims may be asserted under the Equal Protection Clause, a constitutional attack under the First Amendment would achieve the same result directly and perhaps would form a stronger basis. Nonetheless, the Equal Protection Clause provides a sound rationale for

113. Id. at 1521. Some cases run counter to the holding of Olagues. See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) (forms from the Department of Health and Human Services); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (civil service examination); Moua v. City of Chico, 324 F. Supp. 2d 1132, 1139 (E.D. Cal. 2004) (interpreter services at a housing complex). These cases, however, are readily distinguishable from situations like those in Iowa, where the state withdrew non-English voting materials, because in the former cases, plaintiffs were seeking an affirmative equal protection right to compel their governments to provide materials in certain languages. In the latter case, plaintiffs were seeking relief from an affirmative denial of election materials that previously had been provided.


116. See, e.g., United Mine Workers v. Ill. State Bar Ass’n, 389 U.S. 217, 222 (1967) (“[The right to] petition for a redress or grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights.”).

117. See, e.g., Kritz, 170 P.3d at 183.

118. See RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW § 18.40 (4th ed. 2008) (“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.”).
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classical attack, and this analysis provides a framework for a First Amendment challenge as well.

English-only laws, like Iowa's statute, substantially burden linguistic minorities' fundamental right to vote and generally prevent members of these groups from fully exercising their First Amendment right to petition the government and seek redress of grievances. 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 muted in violation of the First and Fourteenth Amendments. These laws diminish non-English speaking voters' abilities to seek effective redress in the political process because they burden their right to vote, which is one of the most essential tools of political change.

Since voting rights are "fundamental," and each voter enjoys an equal voice in the political process, English-only voter registration forms abridge this fundamental right and deprive an identifiable group of the right to effective participation in both state and federal elections.

Although case law is somewhat scant in this area—and the Supreme Court largely has been silent on the issue of English-only laws—two state supreme court cases support a fundamental rights-based equal protection claim against English-only laws. In Ruiz v. Hall, for instance, the Supreme Court of Arizona invalidated the state's English-only law on equal protection grounds. There, the court struck down the law applying strict scrutiny because it found that the law impinged upon the plaintiffs' "fundamental" First Amendment rights to petition the government and participate equally in the political process.

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.").

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."); In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002) (holding that a state English-only law violated state constitutional rights to speech and petition for redress of grievances).


See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (recognizing a fundamental interest in participating in state elections "on an equal basis with other citizens in the jurisdiction").

See Reynolds, 377 U.S. at 561-62.


Ibid. at 1001 ("[The Amendment] is a general prohibition of the use of non-English languages by all state personnel during the performance of government business functions.")
court reasoned that the goal of promoting English "as a common language does not require a general prohibition on non-English usage." 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. Castro focused its analysis on denial of equal access to the political process and the fundamental importance of the right to an effective vote.

The court concluded as follows:

We add one final word. We cannot refrain from observing that if a contrary conclusion were compelled it would indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote.

B. The 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." Also passed in the aftermath of the Civil War, the Amendment was intended to "secure[] freedom from discrimination on account of race in matters affecting the franchise." Through the Fifteenth Amendment, the federal government sought to ensure that newly emancipated slaves had the electoral and political power to protect their nascent rights.

Notwithstanding its unambiguous commitment to racial equality in voting, the Fifteenth Amendment did not operate immediately to prevent states from denying or abridging the right to vote. Federal courts eventually intervened and by all persons seeking to interact with all levels of government in Arizona.

The Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages by state and local governments. Therefore, the Amendment does not meet the compelling state interest test and thus does not survive First Amendment strict scrutiny analysis.

126. Id.
127. 466 P.2d 244 (Cal. 1970).
128. Id. at 251-54.
129. Id. at 259.
130. U.S. Const. amend. XV, § 1.
131. Lane v. Wilson, 307 U.S. 268, 274 (1939); see also United States v. Reese, 92 U.S. 214, 218 (1875) ("Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is.").
133. See id. at 513; South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).
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and invalidated many techniques that states used to circumscribe the Fifteenth Amendment, including grandfather clauses,\textsuperscript{134} white-only primaries,\textsuperscript{135} racial gerrymanders,\textsuperscript{136} and various "procedural hurdles."\textsuperscript{37} Today, although most race-based voting claims arise under the Fourteenth Amendment,\textsuperscript{138} the Fifteenth Amendment continues to stand as an effective bar against racial discrimination in voting.\textsuperscript{39}

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; and (3) this intent was on account of race, color, or previous condition of servitude.\textsuperscript{140} This Section considers 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.\textsuperscript{41} Accordingly, the Amendment applies not only to actual denial of the right but also to practices that impair effective exercise of the franchise.\textsuperscript{42} As the Supreme Court explained in \textit{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."\textsuperscript{43} In \textit{Gomillion v. Lightfoot},\textsuperscript{44} for instance, the Supreme Court found a Fifteenth Amendment violation where the city altered its political boundaries to exclude almost all African-Americans from the electorate.\textsuperscript{45} More recently, the Court suggested that a state does not run afoul of the Fifteenth Amendment so long as its minority citizens can "register and vote without hindrance."\textsuperscript{146}
Beyond a denial or abridgment of the right to vote, a violation of the Fifteenth Amendment also requires the state to have intended to impinge on the franchise because of race, color, or previous condition of servitude.\(^{147}\) Although the requirement of intent is not found in the text of the Amendment, the Supreme Court in *City of Mobile v. Bolden* read this requirement into both the Fourteenth and Fifteenth Amendments.\(^{148}\) Intent in this context generally means that the purpose of the law must be to deny or abridge the right to vote.\(^{149}\) As a result, the best argument that English-only policies as applied to voting violate the Fifteenth Amendment is one of proxy.

Because the Fifteenth Amendment protects persons of all races,\(^{150}\) state action designed to deny or abridge the voting rights of members of *any race* is subject to Fifteenth Amendment scrutiny.\(^{151}\) In recent years, the Court has shown some willingness to find a Fifteenth Amendment violation in the absence of a denial or abridgement explicitly based upon race.\(^{152}\) In *Rice v. Cayetano*, 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.”\(^{153}\) The Court reasoned that ancestry served as a “proxy” for race and that the state “used ancestry as a racial definition and for a racial purpose.”\(^{154}\) 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.\(^{155}\)

English-only laws as applied to voting materials do not generally *deny* the right to vote to any class of voters because these laws do not expressly prohibit

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Rights Act. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 45 (1982). In determining whether a jurisdiction has violated § 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 effectively in the political process.” *Id.* at 37 (quoting S. REP. No. 97-417, at 28-29 (1982) (emphasis added)).

147. See *Bolden*, 446 U.S. at 62 (“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.”).


151. *Id.*

152. *Id.*

153. *Id.* at 496.

154. *Id.* at 515.

155. *Id.* at 517.
certain individuals or groups from voting. Therefore, the strongest argument against English-only laws in this context is that the laws abridge the right to vote because requiring voters to fill out forms only available in a language other than their native one may “effectively handicap [their] exercise of the franchise . . . although the abstract right to vote may remain unrestricted as to race.” Even if a state offers translators to assist voters in completing materials, requiring a non-English speaker to fill out a form in English as a voting condition nonetheless operates to abridge one's right to the franchise. The extent of abridgement, however, can be revealed only after investigation into the realities on the ground in particular communities.

Beyond proving abridgement, another difficulty lies in proving that the abridgement was on account of race or color. As discussed in the Fourteenth Amendment context, English-only laws generally are facially neutral—the laws do not explicitly abridge the right to vote of any identifiable racial group. Nonetheless, the totality of the circumstances provides circumstantial evidence of intent, meaning that one might discern discriminatory intent through, for instance, legislative history and disparate impact on a cognizable racial group. Moreover, plaintiffs also can argue that the state intended to discriminate against them based on language, where language is a proxy for race. Although states might defend themselves against accusations of discriminatory intent by arguing that the passage of English-only laws are based on respect for the English language or the value of assimilation, these arguments fall short. When applied to voting, the laws are at best overbroad because they exclude eligible voters from the political process. This expansiveness might properly be ascribed to discriminatory intent. Indeed, hindering the exercise of the franchise undercuts the assimilation of immigrants that English-only supporters seek to promote. By impairing the franchise, states like Iowa

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156. Cf. Terry v. Adams, 345 U.S. 461, 469-70 (1953) (holding that preprimary election discrimination violates the Fifteenth Amendment)


158. See supra Section III.A.


160. In Ruiz v. Hull, for instance, the Supreme Court of Arizona held that the state's English-only requirement was overbroad because promoting English “as a common language does not require a general prohibition on non-English usage.” 957 P.2d 984, 1001 (Ariz. 1998).
effectively block eligible voters who do not speak English from directly influencing government policy.\textsuperscript{161}

Combining \textit{Hernandez} with \textit{Rice}, challengers to English-only laws may argue that laws like Iowa's are devices that produce an equivalent to the prohibited election in violation of the Fifteenth Amendment.\textsuperscript{162} 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 the facts of \textit{Rice} where ancestry served as a proxy for a homogenous racial group.\textsuperscript{163} Whether this argument prevails depends on the demographic characteristics of the 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 \textit{Hernandez} or extend the holding of \textit{Rice} to abridgment in a facially neutral context.

\textbf{C. The Voting Rights Act of 1965}

The Voting Rights Act of 1965 (VRA) represents "Congress' firm intention to rid the country of racial discrimination in voting."\textsuperscript{164} In signing the bill into law, President Lyndon Johnson proclaimed that the VRA is "one of the most monumental laws in the entire history of American freedom."\textsuperscript{165} Although many VRA provisions apply only to jurisdictions that meet a specific statutory coverage formula,\textsuperscript{166} other VRA provisions are applicable throughout the nation.\textsuperscript{167} The coverage requirement originally applied only to those jurisdictions with a history of racial discrimination, but Congress subsequently has amended that requirement to address the "problems of 'language minority groups."\textsuperscript{168}

\begin{itemize}
\item[\textsuperscript{161}] This reality arguably exacerbates the already low voter turnout among linguistic minorities. \textit{See generally} Benson, supra note 11, at 264-69 (describing examples of low voter participation among linguistic minorities).
\item[\textsuperscript{162}] \textit{See, e.g.,} Terry v. Adams, 345 U.S. 461, 470 (1953).
\item[\textsuperscript{164}] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).
\item[\textsuperscript{165}] ISSACHAROFF \textit{et al.,} supra note 138, at 461. For an extensive background discussion of the VRA, see RICHARD M. VAELLY, \textit{THE VOTING RIGHTS ACT: SECURING THE BALLOT} (2005).
\item[\textsuperscript{167}] \textit{See, e.g.,} 42 U.S.C. § 1973b.
\item[\textsuperscript{168}] \textit{See S. Rep. No. 94-295, at 24 (1975)} (recognizing a "systematic pattern of voting discrimination and exclusion against minority group citizens who are from

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Many sections of the VRA are applicable only to jurisdictions that meet a certain statutory triggering formula. Specifically, §§ 4(f)(4) and 203(c) of the VRA extend coverage to jurisdictions meeting certain language minority criteria. Sections 4(f)(4) and 203(c), although distinct, operate in a similar manner. These sections require state governments to take affirmative steps to prevent discrimination against linguistic minorities in covered jurisdictions, such as providing materials in “the language of the applicable minority group.”

Other sections apply more generally. Section 2 of the VRA 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 this title . . . .

As the above text indicates, § 2 expressly proscribes states from denying or abridging the right to vote on account of “guarantees set forth in section 1973b(f)(2).” Section 1973b(f)(2), in turn, provides that “[n]o 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.”

Thus, § 2 directly proscribes voting procedures that result in the denial or abridgment of the right to vote among linguistic minorities. Accordingly, a state’s failure to provide linguistic minorities with equal access to registration opportunities may violate the general nondiscrimination requirement of § 2, notwithstanding coverage requirements found elsewhere in the VRA.

To 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 Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2506-10 (2009).

169. See Benson, supra note 11, at 284-94.

170. See, e.g., 42 U.S.C. § 1793aa-1(a), (c). Note that a plaintiff cannot state a claim against Iowa under any section of the VRA that requires coverage, including §§ 4(f)(4) and 203(c). Neither the State of Iowa, nor any of its political subdivisions, is a covered jurisdiction for purposes of the VRA. See 28 C.F.R. §§ 55.5-6 (2003) (determining covered jurisdictions).


172. Id.

173. Id. § 1973b(f)(2) (emphasis added).

174. See, e.g., Hernandez v. Woodard, 714 F. Supp. 963, 969 (N.D. Ill. 1989) (holding that plaintiff linguistic minorities may state a claim under § 2 even though they do not meet the triggering requirements of the linguistic minority-specific sections of the VRA); James Thomas Tucker, Enfranchising Language Minority Citizens: The
demonstrate a § 2 violation, the plaintiff may rely on the totality of the circumstances to show that the electoral process is "not equally open to participation" for a class of protected persons in § 1973a, which includes, by reference to § 1973b(f)(2), linguistic minorities.175

The VRA provides two avenues to challenge English-only laws as applied to voting. First, if the plaintiff lives in a jurisdiction that satisfies enumerated statutory triggering conditions based on demographics, then she is entitled to certain language accommodations, such as written ballots and notices in languages other than English.176 Second, even if the plaintiff is unable to state a claim under the linguistic minority provisions of the VRA, a plaintiff still may state a claim under § 2 of the VRA, which applies nationwide.177 The court in King v. Mauro suggested as much when dismissing the challenge to Iowa's English-only law.178 Although not raised by the parties, the court opined that the VRA "might justify the use of non-English voter registration forms, [as the VRA] [r]ecognizi[es] that language barriers can serve as an impediment to voting . . . "179

With this second avenue in mind, the strongest argument against Iowa's English-only statute is that the law operates as a "prerequisite to voting or standard, practice, or procedure" that abridges the voting rights of language-minorities in contravention of §§ 1973a and 1973b(f)(2). Similar to a Fifteenth Amendment abridgement claim,180 the argument would state that requiring voters to fill out a registration form only available in a language other than their native tongue may "effectively handicap [their] exercise of the franchise."181 Although the Fourteenth and Fifteenth Amendments require a showing of discriminatory intent,182 § 2 of the VRA requires only a showing that voting in Iowa is "not equally open to participation" by linguistic minorities.183 To make

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176. See id.
177. See Hernandez, 714 F. Supp. at 969.
179. Id. at 29.
180. See supra Section III.B.
183. See 42 U.S.C. §§ 1973a-1973b (2006). Note, however, that some commentators question the constitutionality of § 2 of the VRA. Because congressional authority to pass the VRA derives 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 § 2. See generally ISSACHAROFF ET AL., supra note 138, at 700-11 (describing both sides of the debate).
that determination, courts rely on the totality of the circumstances, which include contemporary hostility to linguistic minorities, the use of overt or subtle racial appeals in political campaigns, and the extent to which members of the minority group have been elected to public office in the jurisdiction.\textsuperscript{184} Because no showing of intent is required, VRA-based challenges to English-only laws are much stronger than claims based on the Fourteenth and Fifteenth Amendments.

**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 salient example, this Essay has attempted to expose the constitutional vulnerability of English-only laws as applied to voting. The Essay has provided an overview of recent developments in the law and the legal foundations that practitioners and plaintiffs might use to combat these developments. By exploring complex and uncertain areas of the law, it has detailed how one may argue that English-only laws violate the Fourteenth and Fifteenth Amendments as well as, more strikingly, the Voting Rights Act of 1965. 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 United States continues down the latter path, civil rights lawyers must be ready to respond.

\textsuperscript{184} See Thornburg v. Gingles, 478 U.S. 30, 37 (1986) (listing the factors considered to determine the totality of the circumstances in the vote dilution context).