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The Constitutional Future of the All-English Ballot

In 1922, Justice Holmes remarked, "[I]t is desirable that all citizens of the United States should speak a common tongue." While this statement may reflect a social policy that has existed in America from the inception of the nation, the goal simply has not come to pass. An estimated thirty million persons, whose mother tongue is not English, reside in the United States. This figure represents over eleven percent of the population. Additional reports estimate over one percent of the United States population speaks English not well or not at all. The problem of English illiteracy necessarily affects many aspects of life in the United States, including the right to vote.

In 1975, Congress addressed this problem of English illiteracy by amending the 1965 Voting Rights Act. The amendment established a ten year experiment, mandating the use of bilingual ballots and voting materials in certain geographical areas of the country. Congress recently extended the life of federal law title 42, United States Code Section 1973aa-1a, the bilingual ballot provision, to the year 1992. Many Californians do not agree with this federal action and on November 6, 1984, voiced their opinion through the passage of Initiative Statute 38. The initiative statute requires the Governor of California to write to the President of the United States, the United States Attorney General, and all members of Congress, a communication urging that ballots, voter pamphlets, and all other official voting materials be printed in English only.

The goal of Initiative Statute 38 is to establish an English-only voting ballot in California. This can be achieved through two different legislative routes: (1) Congress may repeal the federal bilingual ballot statute, thereby allowing California to enact English-only voting legislation; or (2) Congress may amend the present federal law to man-

5. Id.
6. See id.
7. See California Secretary of State, California Ballot Pamphlet 50 (General Election November 6, 1984).
8. See id. at 51.
9. Id. at 52.
date the uniform use of English-only voting materials. Under either alternative, if the goal of Initiative Statute 38 is achieved legislatively, the problem of language minority voting rights will be shifted to a judicial forum.

This author will examine the constitutional future of the goal of Initiative Statute 38 and establish that the goal cannot withstand constitutional scrutiny. The right of a state to determine franchise qualifications initially will be focused upon, with particular emphasis on the historical use and eventual ban of literacy tests. The 1975 congressional amendments to the Voting Rights Act and Initiative Statute 38 then will be explored. Furthermore, this author will identify the judicial trend toward expansion of the fundamental voting right to encompass the effective ability to cast a political choice. This examination will reveal the constitutional infirmities of the proposed English-only ballot under the United States Constitution. Finally, a similar analysis will exhibit the problems that an English-only ballot will encounter under the California Constitution. To provide a clear understanding of the constitutional issues involved, a preliminary discussion of the right of a state to determine voter qualifications is necessary.

STATE AUTHORITY TO ESTABLISH VOTER QUALIFICATIONS

The right to vote is a political right. Through express and implied provisions of the United States Constitution, the individual states traditionally have established voter qualifications for both state and federal elections. Article I section 2 of the Constitution, read with the seventeenth amendment, provides that in elections of United States Representatives and Senators, the electors of each state shall have the qualifications required for electors of the most numerous branch of the legislature of that state. The valid use of this state authority can be seen in

11. See infra notes 18-39 and accompanying text.
12. See infra notes 40-67 and accompanying text.
13. See infra notes 68-91 and accompanying text.
14. See infra notes 92-128 and accompanying text.
15. See infra notes 129-50 and accompanying text.
16. See infra notes 151-81 and accompanying text.
17. See infra notes 182-93 and accompanying text.
22. Id.

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the various citizenship and residency qualifications that the states currently employ.23

The right to control voter qualifications, however, does not rest exclusively with the states.24 The right of a state to control federal elections is subject to congressional power under article I, section 4 of the United States Constitution.25 In the 1932 case of Smiley v. Holm,26 Chief Justice Hughes interpreted the constitutional authority of Congress over the election of the United States Senators and Representatives to go far beyond the actual wording found in the Constitution.27 Hughes asserted that the comprehensive words of the provision imbued Congress with the authority to provide a complete code of congressional elections.28 The Chief Justice concluded that this interpretation was necessary for Congress to enact the numerous requirements for procedure and safeguards that experience reveals are necessary to enforce the fundamental right of voting.29 The federal supremacy over state voter qualification authority was expanded by the 1969 Supreme Court ruling of Kramer v. Union Free School District.30 In Kramer, the Court abandoned the traditional deferential review of the state voting statutes and announced that any device that burdens the right to vote should be subjected to strict scrutiny.31 Amendments to the Constitution have placed additional restrictions on the ability of states to impose voting requirements.32 The fifteenth amendment prohibits the states from impairing the franchise on the basis of race, color, or previous condition of servitude.33 The nineteenth amendment forbids sex discrimination in voting.34 The twenty-fourth amendment prevents the states from imposing any voting tax on a person before that person can vote for a candidate for a federal

23. See, e.g., CAL. CONST. art. II, §2 (describing the citizenship and residency requirements of California).
25. See U.S. CONST. art. I, §4, cl. 1. The clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." Id.
27. Id. at 366.
28. Id.
29. Id.
31. See id. at 626. The application of the strict scrutiny standard will result in holding all franchise restrictions unconstitutional unless the restriction is necessary to promote a compelling state interest. See infra notes 159-65 and accompanying text.
32. See J. Nowak, R. Rotunda & J. Young, supra note 19, at 765.
33. See U.S. CONST. amend. XV.
34. See U.S. CONST. amend. XIX.
The twenty-sixth amendment grants voting rights to all citizens of the United States who are eighteen years or older. Thus, the Constitution allocates to the states the right to make laws regarding state and national elections, but provides that if Congress becomes dissatisfied with the state laws, Congress can alter them. This congressional right has been expanded by case law. Furthermore, various constitutional amendments, enacted to protect the voting rights of various minority citizens, have placed additional specific limitations on the right of a state to establish voter qualifications. An illustrative example of this procedure is the historical use of literacy tests as a method of voter qualification.

A. The Use of Literacy Tests

The use of a literacy test as a device to restrict certain minorities from the polls has a long and pernicious history. A typical literacy test required all voter applicants to be able to read and write English before the applicants could exercise their right to vote. Many southern states included in their state constitutions a "grandfather clause," which exempted white illiterates from the literacy test because they were lineal descendants of persons entitled to vote on January 1, 1866. The use of a literacy test coupled with a grandfather clause allowed illiterate whites to vote but effectively denied the franchise to the majority of southern blacks until 1913, when the Supreme Court held that the use of a grandfather clause was unconstitutional.

This ruling, however, did not dissuade the use of state literacy tests, and as late as 1960, the Supreme Court upheld the valid application of these tests. The case of Lassiter v. Northampton County Board upheld the validity of literacy tests as a method of voter qualification.

35. See U.S. Const. amend. XXIV.
36. See U.S. Const. amend. XXVI.
38. See supra notes 26-31 and accompanying text.
39. See supra notes 32-36 and accompanying text.
42. A "grandfather clause" has been defined as an exception to a restriction that allows all those already doing something to continue doing so even if they would be stopped by the new restriction. See Black's Law Dictionary 629 (5th ed. 1979).
43. See Guinn v. United States, 238 U.S. 347, 364 (1913).
44. See id. The decision invalidated the grandfather clause of the Oklahoma State Constitution. Id. The Court found that the clause violated the fifteenth amendment because the obvious effect of the clause was to impose the literacy test upon former slaves and their descendants. Id.
46. 360 U.S. 45 (1960).
upheld the literacy test of North Carolina by concluding that the ability to read and write has a rational relationship to standards designed to promote the intelligent use of the ballot.\textsuperscript{47} In reaching this conclusion, the Court reasoned that although literacy and intelligence are not synonymous, the reliance of society on printed materials to canvass campaign issues may justify a state in allowing only those persons who are literate to exercise the franchise.\textsuperscript{48}

Five years later, however, the Court decided the cases of \textit{United States v. Mississippi},\textsuperscript{49} and \textit{Louisiana v. United States},\textsuperscript{50} in which the Court finally recognized the discriminatory use of these tests.\textsuperscript{51} The Mississippi Constitution required a voter applicant to possess the ability to read, understand, and interpret any provision of the state constitution.\textsuperscript{52} Good moral character and the ability to fill out the required forms properly were further prerequisites for voting.\textsuperscript{53} The Louisiana statute required the voter applicant to state a reasonable interpretation of any clause in the Louisiana or federal constitutions\textsuperscript{54} and gave state officials virtually unlimited discretion in administering the test.\textsuperscript{55} Recognizing the discriminatory result of these tests, the Court enjoined future use, calling them a "trap, sufficient to stop even the most brilliant man on his way to the voting booth."\textsuperscript{56}

The \textit{Mississippi} and \textit{Louisiana} decisions were given legislative support when Congress passed the 1965 Voting Rights Act,\textsuperscript{57} which prohibited the discriminatory use of literacy tests wherever they had been used in the past.\textsuperscript{58} Finally in 1970, Congress enacted a nationwide ban on all literacy tests.\textsuperscript{59} The constitutionality of this ban was upheld by the Supreme Court in \textit{Oregon v. Mitchell}.\textsuperscript{60} After reviewing the historical use of literacy tests to reduce voter participation in a discriminatory manner,\textsuperscript{61} the \textit{Mitchell} Court determined that a nationwide ban on literacy tests was necessary.\textsuperscript{62}

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.} at 51.
  \item \textsuperscript{48} \textit{Id.} at 52.
  \item \textsuperscript{49} 380 U.S. 128 (1965).
  \item \textsuperscript{50} 380 U.S. 145 (1965).
  \item \textsuperscript{51} \textit{See} \textit{Mississippi}, 380 U.S. at 143.
  \item \textsuperscript{52} \textit{See id.} at 132.
  \item \textsuperscript{53} \textit{See id.} at 133.
  \item \textsuperscript{54} \textit{See Louisiana}, 380 U.S. at 148.
  \item \textsuperscript{55} \textit{See id.} at 150.
  \item \textsuperscript{56} \textit{Id.} at 153.
  \item \textsuperscript{57} 42 U.S.C. §§1971-1974.
  \item \textsuperscript{58} \textit{See id.}
  \item \textsuperscript{59} 42 U.S.C. §1973b.
  \item \textsuperscript{60} 400 U.S. 112 (1970).
  \item \textsuperscript{61} \textit{See id.} at 132.
  \item \textsuperscript{62} \textit{Id.} at 133. The Court said: "[F]aced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout
With this background in mind, the reasons for the eventual ban of all literacy tests can be seen as analogous to the proposed all English ballot problem. Although the ban on literacy tests does not exclude the non-English speaking citizen from the voting booth, an all English ballot may work as effectively as the original literacy test in reducing voter participation in a discriminatory manner. Congress considered the problem of an English-only ballot of 1975. Howard A. Glickstein, a noted authority, testified before Congress that overt discrimination was not the only factor limiting the political participation of non-English speaking Americans. Mr. Glickstein asserted that since most registration and election materials are printed in English, the language barrier often has prevented these citizens from registering or, once registered, from voting effectively. He concluded that this barrier is as significant an impairment of the right to vote as any literacy test used to deny the franchise to blacks. Congress, apparently persuaded by the testimony of Mr. Glickstein and others, subsequently enacted a mandatory bilingual ballot provision as part of the 1975 amendments to the Voting Rights Act.

VOTING RIGHTS ACT: 1975 AMENDMENTS

The United States Supreme Court in *Lau v. Nichols* stated, "we know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." By substituting the word voting, in the above statement, instead of the word classroom, one can begin to appreciate the difficulties of the language minorities when they attempt to engage in the political process. The United States Commission on Civil Rights, in a 1975 report to Congress, noted that English-only registration and voting restrained the political participation of voters whose

the Nation, Congress was supported by substantial evidence in concluding a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments." *Id.*

63. Mr. Glickstein is Director of the Center for Civil Rights at Notre Dame University and was a key witness before the 1975 Subcommittee on the extension of the Voting Rights Act.


65. *Id.*

66. *Id.*


69. *Id.* at 566.


71. *UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER, 117-21 (1975).*
primary language is not English. The Commission also found that despite high illiteracy rates for language minority citizens, state and local areas where they resided continued to adhere to a uniform language electoral system. With this background, Congress amended the 1965 Voting Rights Act by enacting 42 U.S.C. section 1973aa-1a. This amendment mandates the use of bilingual voting ballots if two factors co-exist. The first factor is met if the Director of the Census determines that more than five percent of the citizens of voting age in a state or political subdivision are members of a single language minority. The second factor requires the English illiteracy rate of such persons as a group be higher than the national rate. If both factors co-exist, the state or political subdivision must provide all voter information and materials, including ballots, in the applicable minority language as well as in English. This two-prong test was adopted by Congress in recognition that English-only voting materials used in political subdivisions that contain no language minority citizens do not act as a tool for discrimination and therefore should be allowed to continue.

The amendment was not viewed by Congress as a radical constitutional step, but rather, as an extension of the legislative and constitutional principles already approved by the Supreme Court. The amendment was given a ten year life span, with the goal of the experiment being to determine whether providing bilingual election materials would facilitate voting on the part of language minority citizens and bring them into the electoral process on an equal footing with other citizens. Furthermore, the amendment rejects the notion that the denial of a fundamental right is a necessary or appropriate means of encouraging people to learn English.

72. See id. at 117.
73. See 42 U.S.C. §1973aa-1a(e) (defining the term “language minority citizen” as those who are persons of Asian American, American Indian, Alaskan Natives, or Spanish Heritage).
76. See supra note 73 and accompanying text.
78. Id. §1973aa-1a(e).
81. Id. The enforcement powers of the post-civil war amendments have been interpreted broadly under the “remedial powers” of Congress. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 19, at 833-41. Supreme Court decisions also have suggested Congress may use subsequent legislation to redefine the meaning and scope of the constitutional guarantees of the amendments. See South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).
83. Id. at 800.
Although initially a temporary ten year measure, Congress recently extended the bilingual election provision until 1992. The extension, however, did not receive unanimous congressional support. Furthermore, the extension was not fully supported by the United States Commission on Civil Rights, which originally proposed the legislation. A prominent member of the Commission labeled the amendment a "misguided experiment" and strongly urged Congress not to extend the minority language provisions of the Voting Rights Act. From the strong support of California Initiative Statute 38, many Californians apparently agree with those who urge the abandonment of the bilingual ballot amendment.

**INITIATIVE STATUTE 38**

California Initiative Statute 38 is a state declaration of public policy concerning the official use of the English language. The passage of the statute requires the Governor of California to convey a communication to the President of the United States, the United States Attorney General and to all members of the United States Congress, stating that the people of California request that federal law be amended so ballots, voter pamphlets, and all other official voting materials can be printed in English only.

The ultimate goal of Initiative Statute 38, the establishment of an "official" national language, is not a novel suggestion. Although the Constitution contains no reference to choice of a national language, John Adams proposed the establishment of an English language in-

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84. *Id.* at 798.
86. *See* The Voting Rights Act, 40 CONG. Q. 1456 (1982).
89. Commissioner Stephen Horn.
91. The official result of the November 6, 1984 vote on California Initiative Statute 38 was 16,390,676 for; 2,645,599 against.
92. *See* Ballot Pamphlet, *supra* note 7, at 50.
93. *Id.* at 51. The actual text of the communication was:
   The People of the State of California, recognizing the importance of a common language in unifying our diverse nation hereby urge that Federal law be amended so that ballots, voters' pamphlets and all other official voting materials shall be printed in English only.
94. *Id.* at 52.
stitute to promote the uniform use of the language. This and similar proposals were rejected by the framers of the Constitution as inconsistent with the social make-up of the young country. In 1917, Theodore Roosevelt actively campaigned for a uniform national language. He argued since there is but one flag "we must also have but one language . . . we cannot tolerate any attempt to oppose or supplant the language and culture that has come down to us from the builders of this republic." In April 1981, a constitutional amendment that would establish English as the "official" language was proposed. This attempt, like Mr. Roosevelt’s, found minimal support in Congress. These numerous attempts at declaring English the official national language reflect some of the policy justifications behind Initiative Statute 38.

A. Policy Justifications for the Goals of Initiative Statute 38

The goal of Initiative Statute 38, the implementation of an all English ballot, can be justified on several grounds. The first and strongest justification is the desire that all United States citizens speak a common language. An all English voting ballot would promote this goal by motivating language minority citizens into full economic, social, and political life. In addition, the motivation to acquire the use of English would discourage the perpetuation of language ghettos currently found in many areas of the United States.

A second justification for the proposed all English ballot is that the present use of bilingual ballots is unnecessary. Advocates of this argument assert that since virtually all applicants for United States citizenship must pass a test for English proficiency, bilingual ballots are dispensable. The persuasiveness of the first and second arguments

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96. Id.
98. Id.
99. Id. at 44.
100. Id.
102. See Ballot Pamphlet, *supra* note 7, at 52.
103. Id.
104. See 8 U.S.C. §1423. This section requires most candidates for United States citizenship to demonstrate: (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language; (2) a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States. Id.
105. See Ballot Pamphlet, *supra* note 7, at 52; see also Wagner, *supra* note 97, at 41.
is increased when the financial burden of bilingual ballots, the third justification, is taken into account.\textsuperscript{106}

By adopting an English-only ballot, a state will avoid the cost and administrative complexity entailed in providing a bilingual electoral system.\textsuperscript{107} For example, the 1982 cost of bilingual voting materials in California exceeded $1,200,000.\textsuperscript{108} These costs include the expense of translating, printing, and distributing ballots, sample ballots, and election pamphlets in various languages.\textsuperscript{109} Additional expenses for ballot counting also are foreseeable.\textsuperscript{110}

Finally, a fourth justification is that the current use of bilingual ballots in limited situations may be "inherently discriminatory."\textsuperscript{111} If equal protection of the law requires voting rights assistance to language minority citizens,\textsuperscript{112} that assistance should be given to all language minorities, not just to those who reach a certain percentage of the overall population.\textsuperscript{113} Despite these strong justifications against the bilingual ballot, equally strong countervailing justifications for their present use exist and must be explored.

\textbf{B. Policy Justifications for a Bilingual Electoral System}

The current law mandating the establishment of a bilingual electoral system is supportable on a number of grounds. The first justification is that the use of bilingual ballots allows all citizens to live and participate in government free from discrimination.\textsuperscript{114} The Supreme Court has held that facts and circumstances behind a state statute must be considered in determining whether a state law violates the equal protection clause of the fourteenth amendment.\textsuperscript{115} The qualifications and opportunity to vote in this country have a history of prevalence toward
nativism. Bilingual ballots secure protection from the inequities of that history. In the tenth Federalist Paper, James Madison warned his compatriots about the dangers of factionalism. He also noted, however, that a selfish and intolerant majority is the worst faction of all because they control the power to impose their will. A second justification for a bilingual ballot concerns notions of fundamental fairness. Minority leaders assert that bilingual assistance is needed for many citizens to cast their political vote effectively. American citizenship may be obtained with only a fifth grade understanding of the English language. Many states, including California, however, consistently have complex initiative statements that must be understood and decided upon. Thus, a fifth grade understanding of the English language clearly is insufficient to cast an effective ballot.

The third justification for the use of bilingual ballots is to increase the voter participation of language minority citizens. During the Congressional hearings on the 1970 amendments to the Voting Rights Act, the Attorney General testified he believed literacy tests to be a physical barrier to minority voting. More importantly, the Attorney General stated that the tests are a psychological obstruction in the minds of many minority citizens. An English-only ballot will pose a similar psychological deterrent to qualified voters who cannot read English.

Finally, a fourth justification is that the cost and administrative complexities of a bilingual electoral system would not outweigh the constitutional right. Avoidance of administrative costs, though a valid concern, cannot justify imposition of otherwise improper legislation. Whether the English-only ballot is improper legislation, however, has yet to be determined. Thus, strong arguments can

116. See supra notes 40-67 and accompanying text. See generally The Voting Rights Act: Unfulfilled Goals, supra note 90, at 22, 34 (documenting minority harassment and intimidation with attempting to register and vote).
117. See The Federalist No. 10 (J. Madison).
118. See Ballot Pamphlet, supra note 7, at 53.
119. Id.
120. Id.
121. Id.
122. Id. at 52.
123. See Garcia, supra note 40, at 105 n.120.
124. Id.
125. Id.
126. See Castro, 2 Cal. 3d at 241, 466 P.2d at 257, 85 Cal. Rptr. at 33.
128. See infra notes 151-81 and accompanying text.
be put forth both in support of and against the proposed English-only ballot. The proposal, however, also involves issues of constitutional dimension. Whether or not an all English ballot will withstand constitutional scrutiny is a question that should be addressed before America will be prepared to deal with the vast cultural and political problems that a bilingual society present.

**FEDERAL CONSTITUTIONAL ANALYSIS**

In 1885, the Supreme Court first recognized the political franchise of voting as a fundamental political right. Seventy-eight years later, in the case of *Reynolds v. Sims*, the Court reiterated the fundamental nature of this right by asserting that the right to exercise the franchise in a free and unimpaired manner was preservative of other basic civil and political rights. The Court concluded that any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The fundamental right to vote has been interpreted by various federal courts to include not only the physical admission into a voting booth, but also the right to cast effectively a political choice. The trend was initiated in *United States v. Louisiana*, in which the district court required voting assistance to illiterate citizens. The court could not impute to Congress the self-defeating notion that illiterates have the right to vote, but not the right to know for whom they are voting. Another case demonstrating the expanded right to vote is *Garza v. Smith*. Here, the district court held that Texas had violated the equal protection clause by providing electoral assistance to physically disabled voters but denying assistance to illiterate voters. The court concluded that the right to vote is nothing more than an

129. Fundamental rights have been defined as those that have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms. See BLACK'S LAW DICTIONARY 607 (5th ed. 1979). If legislation limits a fundamental right, the Court will scrutinize closely the underlying factual basis for the legislation. See J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 19, at 418.

130. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885). A “political right” has been defined as one that may be exercised in the formation or administration of the government. See BLACK'S LAW DICTIONARY 1043 (5th ed. 1979).


132. Id. at 562.

133. Id.

134. See infra notes 135-50 and accompanying text.


136. See id. at 708.

137. Id.


139. See id. at 137.
"empty ritual" if that right does not include a privilege to be informed of the effect a given physical act of voting will produce.\textsuperscript{140} Puerto Rican Organization For Political Action v. Kusper\textsuperscript{142} was the first case to apply the expanded voting right to non-English speaking citizens. The Kusper decision ordered the Chicago Board of Elections to provide bilingual assistance for Spanish speaking voters.\textsuperscript{143} This was necessary, the court concluded, for the language minority involved to register a political choice effectively.\textsuperscript{144} In 1974, the Torres v. Sachs\textsuperscript{145} court followed suit by holding that the vote of Spanish speaking citizens was seriously impaired by the lack of bilingual election materials.\textsuperscript{146}

The foregoing discussion indicates a judicial trend toward an expansion of the definition of the right to vote.\textsuperscript{147} While the right to vote originally was seen as providing merely access to the voting booth,\textsuperscript{148} the current interpretation finds the fundamental right to include the opportunity for all qualified citizens to cast their political choice effectively.\textsuperscript{149} The impairment of this right, in any degree, raises questions of equal protection.\textsuperscript{150}

\section*{A. Equal Protection of the Laws}

As previously discussed,\textsuperscript{151} the goal of Initiative Statute 38 can be achieved by either a congressional repeal of the bilingual ballot law\textsuperscript{152} and subsequent enactment by California of an English-only statute, or by direct congressional amendment of the federal law\textsuperscript{153} to require English-only ballots. The constitutionality of the state law alternative

\begin{itemize}
\item \textsuperscript{140} Id.\textsuperscript{141} Id.\textsuperscript{142} 350 F. Supp. 606 (N.D. Ill. 1972).\textsuperscript{143} See id. at 611.\textsuperscript{144} Id. at 610.\textsuperscript{145} 381 F. Supp. 309 (S.D.N.Y. 1974).\textsuperscript{146} See id. at 312. The court asserted:

In order that the phrase "the right to vote" be more than an empty platitude, a voter must be able effectively to register his or her political choice. This involves more than physically being able to pull a lever or marking a ballot. It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired.

\textsuperscript{147} Id.\textsuperscript{148} See supra notes 129-46 and accompanying text.\textsuperscript{149} See supra notes 40-67 and accompanying text.\textsuperscript{150} See L. TramE, supra note 24, at 1000.\textsuperscript{151} See supra notes 9-10 and accompanying text.\textsuperscript{152} 42 U.S.C. §1973aa-1a.\textsuperscript{153} Id.\textsuperscript{154} 1041
would require a fourteenth amendment equal protection clause analysis. The federal statute alternative would raise fifth amendment due process concerns.

The fifth amendment originally was interpreted as providing no guarantee against discriminatory legislation by Congress because the amendment contained no express equal protection language. The Supreme Court, however, has altered this view, asserting that the approach to fifth amendment equal protection claims is precisely the same as the equal protection approach under the fourteenth amendment. Thus, an equal protection analysis with no distinction between the fifth and fourteenth amendments will be applied to determine the constitutionality of the proposed English-only ballot.

Although notions of equal treatment for purposes of equal protection do change, the Supreme Court has developed a two-tiered standard of review to determine the existence of equal protection violations. The first tier consists of a "rational basis test," a restrained standard of review by which the Court essentially defers to legislative judgement. The second tier consists of "strict judicial scrutiny," an active standard of review, triggered when a governmental action either impairs a fundamental right or distinguishes a suspect class.

155. Id.
Concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the states. Accordingly, the Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.
158. See Weinberger, supra note 157, at 638 n.2. But cf. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1975) (although both amendments require the same type of analysis they differ because overriding national interests may exist that would allow selective federal legislation that would be unacceptable for an individual state).
160. Although the Supreme Court never has formally established a third "middle" tier of scrutiny, the Court occasionally applies a standard that requires the classification to serve important governmental objectives and to be substantially related to the achievement of those objectives. See Craig v. Boren, 429 U.S. 190 (1976); see also Comment, The Middle-Tier In Action—An Equal Protection Analysis, 9 Ohio N.U.L. Rev. 131, 138 (1982).
162. See J. Nowak, R. Rotunda & J. Young, supra note 19, at 591.
163. Id.
164. Id.
165. Id.
Since the two methods of achieving the goal of Initiative Statute 38 require legislation that would impair the fundamental right to vote, the Supreme Court will apply the second tier "strict scrutiny" test. Under a two-prong test, the suspect legislation will be constitutionally invalid unless a compelling state interest is shown. The second prong requires that the legislation be necessary to promote the interest found to be compelling.

Two possible state interests that the proponents of the proposed all English ballot would assert as compelling are: (1) the interest of the state in maintaining a single language electoral system; and (2) the interest of the state in encouraging non-English speaking citizens to learn English. By applying the strict scrutiny test to the first state interest above, the court will require the government to show that the value of maintaining a single language electoral system is so great that the interest justifies the limitation of the fundamental right involved. The inquiry poses an initial problem with the constitutional soundness of this asserted state interest. The underlying motivation of the first interest is primarily financial. By using an all English electoral system the state may avoid the financial burden that a bilingual system demands. The interest also produces overall administrative convenience to the state. The Supreme Court has recognized administrative benefit and convenience as a valid state concern, but has held consistently that the benefit does not justify the impairment of a fundamental right. The first proposed interest raises additional problems under the second prong of the strict scrutiny standard. This prong requires the Court to reach the conclusion that the governmental action is necessary to promote the compelling state interest.

166. See supra notes 129-50 and accompanying text.
168. Id.; see also Rosenstock v. Scaringe, 357 N.E.2d. 347, 348 (1976); Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972). The Court described the application of this test as:
Thus phrased, the constitutional question may sound like a mathematical formula.
But legal "tests" do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and the statute will be closely scrutinized in light of its asserted purposes.

Id. The difficulty of this review standard has been described as, "strict in theory and usually fatal in fact." See Gunther, The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine of Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).
169. See Castro, 2 Cal. 3d at 241, 466 P.2d at 257, 85 Cal. Rptr. at 33.
The maintenance of a single language electoral system is necessary to achieve administrative convenience and efficiency, but since the Supreme Court has refused to recognize state administrative benefit as compelling, the interest fails under the strict scrutiny review.

Application of the strict scrutiny standard to the second state interest, encouraging non-English speaking citizens to learn English, renders a similar result. This state interest in encouraging non-English speaking citizens to learn English is a desirable goal, but will likely fall short of becoming a compelling state interest. To establish the compelling nature for all United States citizens to speak English, the government must come forward with sufficiently convincing proof to justify the abridgment of the fundamental right to vote. Since the birth of this nation, the United States has been a place of social and cultural assimilation. Blending of culture and language is an asset that should not be restricted by legislation that does not reflect the social make-up of the country. Therefore, the evidence propounded by the government likely will be inadequate to establish the compelling need for all citizens to understand English.

Even if the Court were to find this state interest compelling, however, the second strict scrutiny prong of necessity still must be met. Necessity requires that a close nexus exist between the state objective and the means sought to achieve that objective. If alternatives exist that will promote the state interest without infringing upon a fundamental right, the second prong will not be satisfied and the proposed legislation will fail strict scrutiny review. Applying the above discussion, alternative means to encourage non-English speaking citizens to learn English without directly impacting upon their fundamental right to vote should be analyzed. For example, bilingual education, implemented to convey language minorities into the common tongue, common allegiance of English, is a viable alternative that promotes the same interest without infringing upon the fundamental right to vote. Therefore, the second state interest also fails under the strict scrutiny test.

175. See supra note 1 and accompanying text.
176. See generally Wagner, supra note 97 (describing the social make-up of early America).
177. See supra note 174 and accompanying text.
178. Id.
179. Id.
180. See generally McFadden, Bilingual Education and the Law, 12 J. Law & Ed. 1, 1-27 (1983); Levin, The Courts, Congress, and Educational Adequacy: The Equal Protection Predica-
From the foregoing application of the equal protection strict scrutiny test to the proposed all English ballot, the asserted state interests do not adequately meet the compelling status required by constitutional interpretation nor is the legislation necessary to achieve the asserted state interest. The above discussion places the proposed goal of Initiative Statute 38 into serious constitutional question. Whether an English-only voting ballot similarly will violate the California state constitution also should be analyzed.

CALIFORNIA CONSTITUTIONAL ANALYSIS

Despite the early Spanish culture of California, the original state constitution provided that all official writings be in English only. Although this section later was repealed, a similar statement can be seen throughout the current California Code. The California Supreme Court addressed the issue of a mandatory bilingual ballot in the 1970 case of Castro v. State of California. In holding California no longer could exclude Spanish literates from the polls, the court refused to require the state to adopt a bilingual electoral system. The court asserted that the interest of the state in maintaining a single language system was substantial, and concluded that providing voting ballots and materials in Spanish was not necessary to the formation of intelligent opinions on election issues or implementing those views through the voting process.

Notwithstanding the opinion of many Californians, as expressed through Initiative Statute 38, a California court likely would reach a different conclusion today. As discussed in the previous section, the fundamental right to vote has been interpreted broadly by federal
courts to include the right to effectively cast one’s vote.\textsuperscript{190} California courts have held consistently that while the equal protection provisions of the California Constitution\textsuperscript{191} are independent of the fifth and fourteenth amendments to the United States Constitution, these provisions are substantially equivalent.\textsuperscript{192} Equal protection questions under the California Constitution will be decided by the identical standards discussed in the federal analysis.\textsuperscript{193} Thus, if a California court were to apply the strict scrutiny analysis the equal protection clause requires, they too would find a lack of a necessary compelling state interest to uphold an English-only ballot as constitutional.

CONCLUSION

The people of California recently have voiced their strong preference for an English-only election ballot. For this preference to be realized, existing federal law first must be repealed or amended. This writer has demonstrated that English-only ballot legislation will confront strong constitutional attack. An expanded view of the fundamental right to vote, tested against the strict scrutiny approach equal protection demands, simply will not yield the requisite compelling state interest. This result reflects the proposition that the protection of the constitution extends to all citizens, not just to those who speak the English language. The result also exhibits that while a monolingual society may be highly advantageous, that goal cannot be coerced by methods which conflict with the Constitution.

Marc Douglas Francis

190. \textit{See supra} notes 129-50 and accompanying text.
193. \textit{See supra} notes 151-68 and accompanying text. California courts may grant more protection under the state constitution than federal courts under the federal equal protection analysis by utilizing the constitutional principle of “independent and adequate state grounds.” \textit{See} J. NOWAK, R. ROTUNDA, \& J. YOUNG, \textit{supra} note 19, at 95. The California Supreme Court has declared:

\begin{quote}
[I]n the area of fundamental civil liberties . . . we sit as a Court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law. Serrano v. Priest, 18 Cal. 3d 728, 764, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366 (1976). See generally Falk, Foreword: The State Constitution: A More Than ‘Adequate’ Non-federal Ground, 61 CALIF. L. REV. 273, 275 (1973); Bice, Anderson and the Adequate State Ground, 45 So. CAL. L. REV. 750, 750-55 (1972) (explaining the principle of adequate and independent state grounds).
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