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COMMENTS

SPEAKING THE LANGUAGE OF EXCLUSION: HOW EQUAL PROTECTION AND FUNDAMENTAL RIGHTS ANALYSES PERMIT LANGUAGE DISCRIMINATION

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"If you spoke as she did, sir, instead of the way you do, why you might be selling flowers, too."[1]

I. INTRODUCTION

In the summer of 1995, the en banc Texas Court of Criminal Appeals in *Flores v. State*[2] upheld a lower court's ruling that gave a drunk-driving (DWI) offender, Aristeo Lira Flores, a one-year term of imprisonment rather than a one-year term of probation.[3] The trial judge denied probation not because of the offender's character or the seriousness of the offense, but because Mr. Flores could not speak English.[4] The county in which Mr. Flores was arrested and convicted did not provide a DWI rehabilitation program in Spanish. Therefore, the judge reasoned that Mr. Flores could not benefit from probation.[5]

In his appeal to the Texas Court of Criminal Appeals, Mr. Flores claimed that the lower court violated his equal protection and due process rights under the Fourteenth Amendment of the United States Constitution,[6] and his equality rights and due course of law rights under the

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1. MY FAIR LADY (20th Century Fox 1964).

2. 904 S.W.2d 129 (Tex. Crim. App. 1995) (en banc), *cert. denied*, 116 S. Ct. 716 (1996).

3. *Flores*, 904 S.W.2d at 131.

4. *Id.* at 130. Mr. Flores previously had been convicted of the same offense and placed on probation, but the trial judge did not cite this prior conviction or any other factor in defending his decision. *Id.* at 133 (Overstreet, J., dissenting).

5. *Id.* at 130. The trial judge stated, "'I'm not going to put you on probation. To put someone on probation, I have to feel that they can be rehabilitated, and there are no provisions in this county to help Spanish speaking people who are convicted of alcohol offenses.'" *Id.* at 133 (Overstreet, J., dissenting). According to the Texas Code of Criminal Procedure, judges who grant probation to convicted drunk-driving defendants must order that the individuals attend and successfully complete "an educational program jointly approved by the Texas Commission on Alcohol and Drug Abuse, the Department of Public Safety, the Traffic Safety Section of the Texas Department of Transportation, and the community justice assistance division of the Texas Department of Criminal Justice." TEX. CODE CRIM. PROC. ANN. art. 42.12 § 13(h) (Vernon Supp. 1996). Judges may waive this requirement or grant a time extension on a showing by the defendants of good cause. *Id.* To determine whether good cause exists, judges may consider: (1) "the defendant's school and work schedule"; (2) "the defendant's health"; (3) "the distance the defendant must travel to attend an educational program"; and (4) whether or not the defendant has transportation. *Id.* Judges make their decision based on what they believe to be in the best interest of justice, the public, and the defendant. *Id.* art. 42.12 § 3(a).

6. *Flores*, 904 S.W.2d at 130. The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Texas Constitution.[7] Had the judge denied Mr. Flores, a Latino, probation because of his race, Mr. Flores almost certainly would have been successful on his federal claims,[8] because the very notion of equal protection is intrinsically connected with race.[9] Likewise, Mr. Flores probably would have prevailed on his due process claim had he been able to establish that he had a fundamental right to probation or to be a monolingual

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7. *Flores*, 904 S.W.2d at 130. Texas's version of equal protection provides, in part, that "[a]ll free men . . . have equal rights." TEX. CONST. art. I, § 3. Texas's due course of law provision states that "[n]o citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id.* § 19. In addition, Mr. Flores claimed that the Texas Equal Rights Amendment offered protections beyond those provided anywhere in the federal or Texas constitutions and was broad enough to protect Texas citizens from classifications made on the basis of language ability. *Flores*, 904 S.W.2d at 131; *see also* TEX. CONST. art. I, § 3a (providing that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin").

8. *See Flores*, 904 S.W.2d at 130 (stating that "[t]here is no question that discrimination based on race or national origin is prohibited by the due process, due course of law, equal protection, and equal rights clauses of the United States and Texas constitutions"); *id.* at 131–32 (Myers, J., concurring) (asserting that conviction would be overturned if record had indicated that judge's sentence was intended to discriminate on basis of race).

9. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that main purpose of Fourteenth Amendment's Equal Protection Clause is to prevent racial discrimination); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding* (stating that preventing discrimination against former slaves was chief aim of Fourteenth Amendment), *in* THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 85, 101–02 (Charles Fairman & Stanley Morrison eds., 1970); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1061 (1978) (maintaining that overwhelming goal of Civil War amendments was to establish and protect freedoms of newly-freed slaves); Johnny Parker, *When Johnny Came Marching Home Again: A Critical Review of Contemporary Equal Protection Interpretation*, 37 HOW. L.J. 393, 394 (1994) (acknowledging that principal object of Fourteenth Amendment was to create equality between African-Americans and Caucasians); *see also* Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93, 94 (1994) (indicating that because preventing racial discrimination was primary reason for Fourteenth Amendment, Supreme Court evaluates laws promoting racial bigotry with closer scrutiny). How strictly the early Court reviewed race discrimination is debated. *Compare* Michael Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 227 (1991) (arguing that, before 1960s, Supreme Court failed to read Fourteenth Amendment as presumptively striking racial classifications), *with* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 940 (1991) (noting that early Supreme Court decisions dealing with equal protection issues acknowledged equal protection rights for all races). Also unclear is just *how* protected the amendment's authors intended African-Americans to be. *See* JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 290 (1984) (noting that 1868 Republican platform mandated African-American suffrage only in southern states but left decision to rest of states).

speaker of a language other than English.[10] Mr. Flores's state claims would have been equally successful, because Texas courts have traditionally interpreted and applied their equal protection and due course of law provisions by the same standards as those used for the federal provisions.[11]

Mr. Flores, however, invited the court to resolve current federal and state confusion over the issue of language and find constitutional protection for individuals who are unable to speak English.[12] The court declined the invitation.[13] Instead, a plurality of the court formalistically applied the rigid classification scheme for assessing equal protection claims and summarily dismissed Mr. Flores's claim that a due process fundamental right was at issue,[14] thus denying him any remedy for the alleged violations of his constitutional rights.

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10. *See Flores*, 904 S.W.2d at 130–31 (noting that since Mr. Flores's claim implicated no fundamental right, heightened scrutiny under equal protection analysis was not appropriate). State action rarely survives strict scrutiny. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that strict scrutiny is "'strict' in theory and fatal in fact"); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 485 (1994) (calling government's burden under strict scrutiny "for all practical purposes, insurmountable"). *But cf.* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101 (1995) (disputing strict-in-theory, fatal-in-fact truism for race-remedy cases); Klutznick v. Fullilove, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (stating that strict-in-theory, fatal-in-fact scrutiny should not be applied to race remedial measures).

11. *See* Reid v. Rolling Fork Pub. Util. Dist., 979 F.2d 1084, 1089 (5th Cir. 1992) (noting that Texas equal protection principles "echo" federal principles and have same requirements); *In re* R.L.H., 771 S.W.2d 697, 700 (Tex. App.—Austin 1989, writ denied) (stating federal precedent is "persuasive" interpretation of state constitution's equal protection and due process provisions); Twiford v. Nueces County Appraisal Dist., 725 S.W.2d 325, 328 n.5 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.) (noting Texas and United States equal protection tests have same requirements). *But cf.* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (stating Texas constitution is not dependent on federal constitution for purposes of search and seizure protections); Collier v. Fireman's & Policeman's Civil Serv. Comm'n, 817 S.W.2d 404, 407 (Tex. App.—Fort Worth 1991, writ denied) (noting that Texas Supreme Court has occasionally found equal protection rights to be broader under state constitution than federal constitution); José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right of Government in a "Known Tongue,"* 13 LAW & INEQ. J. 443, 626 (1995) (contending that Texas Equal Rights Amendment provides broader protection than federal constitution).

12. *See Flores*, 904 S.W.2d at 130 (stating Mr. Flores's claim that discrimination on basis of language violates equal protection, due process, due course of law, and equal rights).

13. *See id.* (holding that because language is not equal to race, language discrimination is not subject to strict scrutiny under Fourteenth Amendment).

14. *See id.* (finding no suspect classification or fundamental right at stake in Mr. Flores's claim).

The *Flores* decision coincided with a renewed and sometimes bitter national debate concerning the rights and privileges that language minorities may claim from their government and the extent to which the government may regulate the use of languages other than English.[15] Seven proposals are pending in Congress for either a law or a constitutional amendment that would make English the nation's official language.[16] In addition, twenty-two states have declared English to be their

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15. *See* Miguel Bustillo, *City Criticized for Printing Notices in Spanish Paper*, L.A. TIMES, Sept. 28, 1995, at B1 (describing citizen complaints that arose when municipality awarded contract to publish legal notices to low-bidding Spanish-language newspaper); *English Can Take Care of Itself*, ST. LOUIS POST-DISPATCH, Jan. 27, 1996, at B12 (arguing that official English-language proposal in Missouri is wrong way to encourage immigrants to learn English); Curtis Lawrence, *Making English Official Language Could Be Divisive: Officials Lament Plan That Would End Federal Funds for Bilingual Programs*, MILWAUKEE J. SENTINEL, Nov. 27, 1995, at 3 (noting concern in Milwaukee that official English proposals will divide nation's ethnic groups from whites); David J. Willis, *Time We Draw the Line About Speaking English*, HOUS. CHRON., Sept. 29, 1995, at A39 (stating that if nation cannot preserve its culture by defending its language, then it is not really nation). Two months after the Court of Criminal Appeals issued the *Flores* decision, another Texas jurist, Judge Samuel Kiser of Amarillo, ordered a mother engaged in a custody dispute to start speaking English to her five-year-old daughter or risk losing custody. Diane Jennings, *Judge Orders Amarillo Mother to Speak English to Daughter: Not Doing So Is Abusing Child, He Rules in Custody Case*, DALLAS MORNING NEWS, Aug. 9, 1995, at A1. The judge told the mother, "If she [the child] starts first grade with other children and cannot even speak the language that the teachers and the other children speak, and she's a full-blood American citizen, you're abusing that child." *Id.* The child's mother, a bilingual office clerk, said she spoke Spanish at home to encourage her children to be bilingual. *Id.* This goal, however, did not impress Judge Kiser, who told Ms. Laureno that he could terminate her custody rights because "it's not in [the child's] best interest to be ignorant." *Id.* Judge Kiser later rescinded this order. Patty Reinert, *Amarillo Judge Does About-Face: Girl's Parents Resolve Language Dispute*, HOUS. CHRON., Sept. 19, 1995, at 11. The unconstitutionality of this order is somewhat more apparent than that of the denial of Mr. Flores's probation, because this order interferes with family decision-making. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (suggesting that right of parents to engage teacher to teach their children foreign language is protected under Fourteenth Amendment). Judge Kiser's statements aroused a nationwide controversy. *See, e.g.*, Linda Chavez, *Schools Must Scrutinize Bilingual Programs*, DENV. POST, Sept. 7, 1995, at B-07 (arguing that Judge Kiser was correct in concern for child, but wrong to interfere in parenting decision); Sara Gonzalez, Editorial, ATLANTA CONST., Sept. 18, 1995, at A7 (stating, "I would rather be a housekeeper than call myself a judge and behave like a fool."); James Harrington, *Racism Taints Texas Justice*, DAILY TEXAN, Sept. 7, 1995, at 5 (criticizing *Laureno* and *Flores* decisions); *Language As a Barrier*, INDIANAPOLIS STAR, Sept. 12, 1995, at A12 (opining, "Somebody should explain the law to the judge and do so in plain English."); Myriam Marquez, *Spanish Relegates Child to Housemaid's Future? No Way, Jose*, ORLANDO SENTINEL, Sept. 8, 1995, at A16 (stating, "The U.S. Constitution grants us freedom of speech, but must it be in English?").

16. *See* S. 356, 104th Cong. (1995) (declaring English official language of United States and providing that no person shall be denied government services "solely because the person communicates in English"); S. 175, 104th Cong. (1995) (amending United States

official language.[17] The legal effects of these measures and proposals are

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Code to declare English official language of United States); H.R.J. Res. 109, 104th Cong. (1995) (proposing English as official language); H.R. 123, 104th Cong. (1995) (providing that English will be official language for government business); H.R. 345, 104th Cong. (1995) (making English official language and calling for naturalization proceedings to be conducted solely in English); H.R. 739, 104th Cong. (1995) (calling English "preferred language of communication" and stipulating that all naturalization ceremonies will be conducted in English); H.R. 1005, 104th Cong. (1995) (proposing end to all bilingual education programs). In addition, both the House and Senate proposals for the 1996 budget include provisions forbidding sanctions against any state that declares English as its official language. S. 1594, 104th Cong. (1996); H.R. 3019, 104th Cong. (1996). *But cf.* H.R. Con. Res. 83, 104th Cong. (1995) (noting value of multilingualism and rejecting "English-only" measures as "unwarranted Federal regulation of self-expression and equal protection of the laws"). In 1995, presidential candidates Senator Robert Dole, Senator Richard Lugar, and Patrick Buchanan all endorsed federal legislation or a constitutional amendment enshrining English as the nation's language. Mike Dorning & Melita M. Garza, *English Language Gains New Meaning in National Politics*, CHI. TRIB., Sept. 19, 1995, at 1. President Bill Clinton spoke out against English-only proposals. *See* Adrianne Flynn & Jeff Barker, *Clinton Opposed to GOP-Backed English Only Bill*, ARIZ. REPUBLIC, Sept. 28, 1995, at A17 (reporting Clinton's speech before Congressional Hispanic Caucus Institute, in which he opposed English-only legislation). However, as governor of Arkansas, Bill Clinton signed an official-English measure into law. *The English-Only Debate: Where the Candidates Stand*, USA TODAY, Oct. 18, 1995, at 11A.

17. ALA. CONST. amend. 509; ARIZ. CONST. art. XXVIII; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; HAW. CONST. art. XV, § 4 (making both English and Hawaiian state's official languages); NEB. CONST. art. I, § 27; ARK. CODE ANN. § 1-4-117 (Michie 1996); 1986 Ga. Laws 529 (*see also* 1995 Op. Att'y Gen. 95-16 (1995) (rendering unofficial opinion that 1986 Ga. Laws 529 has force of law)); ILL. ANN. STAT. ch. 5, para. 460/20 (Smith-Hurd 1995); IND. CODE ANN. § 1-2-10-1 (Burns 1995); KY. REV. STAT. ANN. § 2.013 (Michie/Bobbs-Merrill 1992); MISS. CODE ANN. § 3-3-31 (1991); MONT. CODE ANN. § 1-1-510 (1995); 1995 N.H. Laws 157; N.C. GEN. STAT. § 145-12 (1995); N.D. CENT. CODE § 54-02-13 (1989); S.C. CODE ANN. § 1-1-696 (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS ANN. § 1-27-20 (1995); TENN. CODE ANN. § 4-1-404 (1995); VA. CODE ANN. § 22.1-212.1 (Michie 1993). In 1992, Louisiana's assistant attorney general, Kay Kilpatrick, stated in a letter to U.S. ENGLISH, that "English is the only official language of Louisiana." *Update on Legal Official Recognition in Missouri, Louisiana*, U.S. Newswire, Mar. 6, 1992, *available in* LEXIS, News Library, USNWR File. Louisiana's constitution, however, protects the right to "preserve, foster and promote" one's historic linguistic and cultural origins. LA. CONST., art. 12, § 4. In contrast, Puerto Rico enacted legislation making Spanish its official language. 1991 P.R. Laws 4. The statute allows the government to use other languages when "convenient, necessary or indispensable." *Id.* § 3. Oregon has explicitly denounced the idea of English-only legislation. *See* Michele Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 326 n.8 (1991) (summarizing status of English-only laws). An unsuccessful attempt to enact an official English measure was launched in Texas in 1987. *See* Frank M. Lowrey IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 287 (1992) (tracing history of statutes recognizing English as official language). However, in November 1995, a poll indicated some support among Texas voters for English-only legislation. *See* Maria F. Durand, *Poll Shows Most Texans Favor a Law Like Prop 187: Residents Are Divided on*

unclear.[18] Equally unclear is what protections federal and state courts

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Immigration, Language Issues, SAN ANTONIO EXPRESS-NEWS, Nov. 4, 1995, at 1A (reporting results of Texas poll on immigration issues). The poll indicated 44% of Texans favored English-only legislation. *Id.* A 1996 poll, conducted by the Southwest Voter Research Institute, indicated that 56% of Latino voters in Texas oppose official-language legislation. Telephone Interview with Angela Acosta, Research Coordinator, Southwest Voter Research Institute, Inc. (Sept. 12, 1996). However, 90% of Texas Hispanic voters opposed specific measures as English-only ballots or state services provided in only English. *Id.*

18. *See, e.g.*, Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 692 (1995) (arguing effect of English-only amendments is to "render language minorities powerless"); Joseph Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 547 (1985) (contending that broadest proposals could conceivably reverse *Meyer v. Nebraska*, which held that Fourteenth Amendment protected right to teach foreign language or to request that children be taught foreign language); Mike Dorning & Melita M. Garza, *English Language Gains New Meaning in National Politics*, CHI. TRIB., Sept. 19, 1995, at 1 (noting that New Hampshire's English-only measure does not regulate private commercial activity and does not address legality of bilingual education or ballots, although state currently provides neither); Steven Thomma & Angie Cannon, *Language Wars Tap Insecurity; Battle over English Has Historical Basis for Americans*, HOUS. CHRON., Sept. 10, 1995, at 2 (quoting Rep. Toby Roth, who argues that his proposal pending in Congress would abolish all federal mandates and funding for bilingual education and would require all forms, including ballots, to be printed in English only). *But see* Michele Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 328 (1991) (arguing that Supremacy Clause of United States Constitution, which makes constitutional principles and federal laws accommodating language superior to state measures, implies that states' English-only legislation can have little force); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1346–47 (1987) (arguing that state declaration of English as official language will, by itself, have little legal effect but could be used by opponents to eradicate bilingual programs). The United States Court of Appeals for the Ninth Circuit has already invalidated Arizona's English-only constitutional amendment, which made English the state's official language and required that English be used exclusively in all government transactions. Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996). The court distinguished between cases involving the issue of whether the state had an affirmative duty to provide services or information in other languages and cases where the state prohibited use of a foreign language. *Id.* at 936–37. The court relied on the First Amendment to hold that prohibiting language is a denial of constitutional rights. *Id.* at 949; *cf.* Conner v. Sakai, 15 F.3d 1463, 1468 (9th Cir. 1993) (holding prison English-only rule as applied to right to pray violated due process clause), *rev'd on other grounds sub nom.* Sandin v. Conner, 115 S. Ct. 2293 (1995).

However, many English-only provisions also address, less directly, the problem presented by the *Flores* decision: is there a duty to provide benefits, particularly in the criminal justice system, in other languages or, at least, a duty not to allow language to be a consideration for the conferring of benefits? This question was raised anew by the April 1, 1996, beating of two Mexican immigrants by two white police deputies in Riverside County, California. Kenneth B. Noble, *English Commands Preceded Deputies' Beatings of Mexicans*, N.Y. TIMES, Apr. 10, 1996, at A12. According to an audiotape of the incident, the officers, who had received some Spanish training, commanded the immigrants in Eng-

can offer language minorities. Decisions striking or upholding state action against the use of languages other than English have relied, for the most part, on various statutes governing the treatment of non-English speakers.[19] Yet even those statutes, written to protect language minorities, have offered unreliable protections and may not be sufficient to protect individuals from the language-based discrimination endorsed by these measures and proposed laws.[20]

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lish to get down on the ground. *Id.* When the immigrants, who reportedly did not know English, failed to respond, the officers beat them. *Id.* Only after beginning the beating did the officers speak to the suspects in Spanish. *Id.* The American Civil Liberties Union, representing one of the Mexicans, has alleged that the officers' orders were unintelligible. *Id.* Such incidents demand a consideration of the duties that a state owes its monolingual language minorities. This issue is the focus of this Comment.

19. *See* Lau v. Nichols, 414 U.S. 563, 566 (1974) (holding that failure to provide English language instruction to Chinese students violates Title VI, § 601 of Civil Rights Act of 1964); Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) (stating that, under Voting Rights Act, English literacy requirement cannot be used against non-English speakers who have better than sixth grade educations); United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990) (acknowledging that Federal Court Interpreters Act protects rights of language-minority defendants), *cert. denied sub nom.* Panchal v. United States, 498 U.S. 986 (1990). The United States has never formulated an official language policy, but rather developed a patchwork of cases and legislation providing inconsistent protection for language minorities. *See* NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 235 (1983) (attributing lack of official language policy to American desire for privacy and self-determination); *see also* 42 U.S.C. § 1973aa-1a (1994) (requiring that states with significant number of bilingual voters provide bilingual ballots); 20 U.S.C. §§ 7401–7491 (1994) (declaring efforts in schools to teach language-minority children English language to be United States policy); 42 U.S.C. § 2000d (1994) (prohibiting discrimination based on race, color, or national origin in federally funded programs); 29 C.F.R. § 1606.7 (a)–(c) (1996) (providing limits and guidelines for restrictions on foreign-language use in workplace). In addition, the use of foreign languages is mandated in at least two instances: in migrant and community health centers and in alcohol abuse and treatment centers, where there are a substantial number of non-English speakers. *See* 42 U.S.C. §§ 254b(a)(1)(G) & 254c(e)(3)(J) (1994) (requiring that migrant health centers provide interpreters); 42 U.S.C. § 4577(b) (1994) (mandating, to extent practicable, use of interpreters for alcohol rehabilitation programs). Because legislation and its interpretation is inconsistent and could be reversed by English-only laws, this Comment focuses on the protective potential of the Fourteenth Amendment. That the Fourteenth Amendment *should* protect language minorities seems a matter of common sense, but this assertion is not so obvious to the courts. *See* Frank M. Lowrey IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 298–99 (1992) (asserting that barriers to government services based on language may be unconstitutional, but predicting that courts will narrowly construe English declarations so as to maintain constitutionality).

20. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (holding that, because workplace English-only rule had no adverse effect on bilingual workers, it was permissible under Title VII, in spite of EEOC guidelines which state that employer must show business justification for such policy), *cert. denied*, 114 S. Ct. 2726 (1994); Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980) (finding that English-only rule at workplace is

Additionally, surprisingly few court decisions have rested on the Fourteenth Amendment's Due Process[21] and Equal Protection[22] Clauses, and even these decisions have failed to clarify the underlying issues.[23] However, because statutes have provided unreliable sources of protection in an area where constitutional rights are at least suggested,[24] courts must turn to the Fourteenth Amendment or corresponding state measures for ultimate authority on what actions the government may take with regard to language minorities. The *Flores* case powerfully illustrates the central issues of this debate, asking at once whether a state actor may, on a showing of a rational basis, discriminate against a non-English-speaking criminal offender and whether a state has some affirmative duty to accommodate that individual.[25]

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not discriminatory when person who can speak English chooses not to and neither goal nor effect of rule is discriminatory), *cert. denied*, 449 U.S. 1113 (1984); Guadalupe Org., Inc. v. Tempe Elem. Sch. Dist. No. 3, 587 F.2d 1022, 1029–30 (9th Cir. 1978) (holding that Title VI of Civil Rights Act of 1964 and Equal Education Opportunity Act of 1974 require no more than state-provided remedial English instruction); Vialez v. New York City Hous. Auth., 783 F. Supp. 109, 119 (S.D.N.Y. 1991) (holding that Title VI of the Civil Rights Act of 1964 does not require government to offer multilingual notices to meet demands of procedural due process). It is important to note that EEOC guidelines are non-binding, and courts "will not defer to 'an administrative construction of a statute where there are compelling indications that it is wrong.'" *Spun Steak Co.*, 998 F.2d at 1489 (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973)).

21. *See* Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (upholding parents' rights to send children to private Japanese-language schools); Yu Cong Eng v. Trinidad, 271 U.S. 500, 524–25 (1926) (protecting rights of Chinese business persons in Philippines to pursue occupations); *Meyer*, 262 U.S. at 399–400 (identifying fundamental right of language teachers to choose their employment).

22. *See* Hernandez v. New York, 500 U.S. 352, 363–64 (1991) (suggesting possibility of equal protection for language minorities if race/language nexus shown); Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (analyzing voter registration fraud investigation targeting Spanish- and Chinese-speaking individuals under equal protection), *vacated as moot*, 484 U.S. 906 (1987); Soberal-Perez v. Heckler, 717 F.2d 36, 44 (2d Cir. 1983) (holding that English notice of Social Security benefits denial does not violate equal protection), *cert. denied*, 466 U.S. 929 (1984); Frontera v. Sindell, 522 F.2d 1215, 1219–20 (6th Cir. 1975) (holding that failure to provide civil service examinations in taker's native language does not violate equal protection).

23. *See* Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 3 (1992) (noting poor handling of language differences by courts); Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 890, 893 (1986) (calling case law dealing with language rights "confusing" and "contradicting"); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 803 n.124 (asserting that case law evaluating equal protection claims of language discrimination has resulted in inconsistent and inadequate results).

24. *See supra* notes 19–20 and accompanying text.

25. *See Flores*, 904 S.W.2d at 131 (holding that, because language does not form basis for suspect classification and there is no fundamental right to probation, court may deter-

This Comment, relying on the *Flores* decision as a model for constitutional analysis of a language minority's claim, will address these questions and the courts' reluctance to provide satisfactory and consistent answers to them. Part II will briefly discuss America's history with language minorities and the issues they have raised in American law. Part III will address the classifications aspect of equal protection analysis and examine the difficulties of fitting language into the current suspect classification formulation. Part IV will discuss fundamental rights under the Due Process Clause, particularly with an eye toward the rights implicated in the *Flores* decision. Part V will discuss the *Flores* decision. Finally, Part VI will argue that claims alleging language discrimination deserve a higher level of scrutiny under the Fourteenth Amendment.

II. LANGUAGE IN AMERICAN HISTORY

A. *Diversity v. Unification: The Beginnings of Dispute*

The current national debate over language rights is not a new controversy.[26] In the country's early history, immigrants maintained closely-knit settlements and preserved their native languages, often educating their children, printing their newspapers, and conducting their businesses in their native tongues.[27] In addition to Native American speakers, com-

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mine sentence on basis of language). The *Flores* court further stated that a county is not obligated to provide foreign-language alcohol and drug programs to Latinos. *See id.* (contending that acceptance of Mr. Flores's argument would mean state government would be required to set up alcohol education programs in many different languages).

26. *See* DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 42 (1990) (noting that after Revolutionary War, debate arose over whether new nation's "official language" should be English, Hebrew, Greek, or French); Arnold H. Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME L. REV. 7, 20 (1970) (observing that Congress has generally imposed some English language mandate on territory prior to approving its admission to Union); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 303–50 (1992) (discussing language controversies, from appeals for German translations of federal legislation in 18th century through English-only movements of mid- and late 20th century). Language diversity, however, did not always incite controversy in the country's early history. *See* Shirley B. Heath, *English in Our Language Heritage* (citing 1870 U.S. Commission of Education report, which claimed German had become second language of United States and further recognized value of knowing multiple languages in education arena), *in* LANGUAGE IN THE USA 3, 13 (Charles A. Ferguson & Shirley B. Heath eds., 1981); Jurij Fedynskyj, *State Session Laws in Non-English Languages: A Chapter of American Legal History*, 46 IND. L.J. 463, 474 (1971) (noting that between 1774 and 1779, Continental Congress ordered German translations of selected congressional proceedings five times, as well as German translation of Articles of Confederation).

27. Shirley B. Heath, *English in Our Language Heritage*, *in* LANGUAGE IN THE USA 6, 7 (Charles A. Ferguson & Shirley B. Heath eds., 1981); *see* NANCY F. CONKLIN & MAR-

munities of German, Spanish, French, Russian, Swedish, and Dutch speakers thrived in eighteenth and nineteenth century America.[28] However, language maintenance efforts often met with resistance from the English-speaking majority.[29] In 1751, for example, as German settlers in Pennsylvania pressed for bilingual education, German translation of laws, and court interpreters, Benjamin Franklin expressed his fear of the encroachment of the German language in Pennsylvania.[30] Also, states coming into the Union with large, language-minority populations sometimes saw a need to institutionalize English.[31] For example, Louisiana's first

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GARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 226 (1983) (observing that in its first hundred years, United States was multilingual); Shirley B. Heath, *Why No Official Tongue?* (noting that multiple languages played wide variety of roles in country's early history), *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 20, 21–22 (James Crawford ed., 1992).

28. JOSHUA A. FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES 22–23 (1978).

29. *See id.* at 9–10 (noting English speakers' fear that German would overtake English as national language). *But see* Dennis Baron, *Federal English*, (stating that, in spite of language competition in rest of New World, early United States policy was at least officially tolerant), *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 36, 37 (James Crawford ed., 1992); Shirley B. Heath, *Why No Official Tongue?* (asserting that use of languages other than English was widely accepted and encouraged in early United States), *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 20, 22 (James Crawford ed., 1992). Language conversion was a chief goal among policy-makers dealing with Native Americans. *See* J.D.C. Atkins, "Barbarous Dialects Should Be Blotted Out . . ." (arguing that Native Americans must give up indigenous languages to be assimilated into American culture), *reprinted in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 47, 48–49 (James Crawford ed., 1992).

30. *See* Benjamin Franklin, *The German Language in Pennsylvania* (stating, "[t]hey [the Germans] begin of late to make all their Bonds and other legal Writings in their own Language, which (though I think it ought not to be) are allowed in our Courts"), *reprinted in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 18, 18–19 (James Crawford ed., 1992); *see also* Shirley B. Heath, *English in Our Language Heritage* (explaining that Franklin's attack on German language probably reflected his resentment of German dominance in local Pennsylvania politics), *in* LANGUAGE IN THE USA 6, 9–10 (Charles A. Ferguson & Shirley B. Heath eds., 1981); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 287–89 (1992) (discussing Franklin's views on German settlers and their language); *cf.* Heinz Kloss, *German-American Language Maintenance Efforts* (describing large German settlement in Pennsylvania and other states in 18th century), *in* LANGUAGE LOYALTY IN THE UNITED STATES 206, 215 (Joshua A. Fishman ed., 1966).

31. *See* DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 74–87 (1990) (discussing internal efforts in Pennsylvania and Louisiana to establish English as dominant language); Arnold H. Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME L. REV. 7, 20 (1970) (noting that federal government often conditioned statehood on whether territory had high percentage of English speakers in its population). However, after statehood, new states with a large number of language minorities often attempted to encourage or allow foreign language use. Ar-

constitution, adopted in 1812, stated that all laws and judicial and legislative proceedings must be conducted and preserved exclusively in English, in spite of the state's large French-speaking minority.[32]

Increased numbers of immigrants and heightened xenophobia took hold of the country in the early twentieth century, resulting in more programmatic discrimination against non-English-speaking people.[33] World War I reinforced the fear of foreigners, especially German foreigners,[34] and a large number of states adopted laws restricting the use of

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nold H. Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME L. REV. 7, 20 (1970); *see* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 309 (1992) (asserting that some states made efforts to preserve minority language rights or at least to ensure citizens would not be at legal disadvantage because of language).

32. DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 83 (1990). However, Louisiana quickly moved away from its reluctance to accommodate French-speaking citizens; the state printed its Constitution in both French and English, and the 1845 version called for laws to be promulgated in both languages. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 324 (1992); *cf.* Arnold H. Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME L. REV. 7, 20–21 (1970) (observing present-day inconsistencies in Louisiana law and policy regarding accommodation of French language). California proceeded in precisely the opposite way, guaranteeing rights to Spanish-speaking citizens at the beginning of statehood, but then systematically taking them away. NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 66 (1983).

33. *See* Shirley B. Heath, *English in Our Language Heritage* (noting increased xenophobia and resultant state and local laws against language minorities between 1920-1940), *in* LANGUAGE IN THE USA 17 (Charles A. Ferguson & Shirley B. Heath eds., 1981). Professor Heath notes that language often becomes the focus of debate during periods in which immigrants or other minorities are viewed as threatening. *Id.* at 10; *see also* JOSHUA A. FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES 24–25 (1978) (noting that millions of new immigrants came to United States between 1880 and 1920, which was period of heightened interest in language laws); *cf.* Theodore Roosevelt, *The Children of the Crucible* (Sept. 1917) (stating, "[t]he greatness of this nation depends on the swift assimilation of the aliens she welcomes to her shores. Any force which attempts to retard that assimilative process is a force hostile to the highest interests of our country."), *in* LANGUAGE LOYALTIES: A SOURCEBOOK ON THE OFFICIAL ENGLISH CONTROVERSY 84, 85 (James Crawford ed., 1992).

34. *See* NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 31 (1983) (describing anti-German movement taking hold during World War I, resulting in passage of restrictive language laws); JOSHUA A. FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES 30 (1978) (noting that both World Wars resulted in reduction of German language usage in United States); Shirley B. Heath, *English in Our Language Heritage* (stating that xenophobia from 1920 through 1940s resulted in discriminatory measures against German, Japanese, and Chinese speakers), *in* LANGUAGE IN THE USA 6, 17 (Charles A. Ferguson & Shirley B. Heath eds., 1981).

German and other languages, particularly in schools.[35] In an attempt to eradicate German language from American conversation, American patriots replaced 'German fried potatoes' with 'American fries' and 'sauerkraut' with 'liberty cabbage.'[36] At the same time, employers placed greater demands on their workers for English literacy, increasing the motivation to learn English.[37]

B. *The Early Supreme Court Cases: Choosing Fundamental Rights and the Due Process Clause*

Against this background of national animosity toward foreigners, the first case dealing with language rights made its way to the United States Supreme Court.[38] Ultimately resting on a substantive due process analy-

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35. *See* DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 109 (1990) (observing that discrimination against German language in schools was attempt to force assimilation of German citizens and rid country of subversion and espionage); William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 132–33 (1988) (noting 23 states enacted language-restrictive statutes during World War I, most aimed particularly at German education); Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657, 659–61 (1987) (examining increased xenophobia and nativism in early part of 20th century that resulted in laws curtailing foreign language use); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (invalidating law aimed at keeping German language out of Nebraska schools).

36. DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 109 (1990).

37. Shirley B. Heath, *English in Our Language Heritage*, *in* LANGUAGE IN THE USA 6, 16 (Charles A. Ferguson & Shirley B. Heath eds., 1981). In part, Professor Heath asserts, this demand for English literacy stemmed from heightened employer liability for workplace safety; employers viewed foreign-speaking workers as health and safety risks. *Id.* The societal demands for English literacy have not gone away, and the result has been that an overwhelming majority of citizens speak the language. Joshua A. Fishman, *Language Policy: Past, Present, Future*, *in* LANGUAGE IN THE USA 516, 517 (Charles A. Ferguson & Shirley B. Heath eds., 1981). Several alternate explanations for the "Americanization" of immigrants are available. *See* NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 67–70 (1983) (attributing assimilation to increased restrictions on immigration, laws requiring new citizens to speak English, compulsory education, and American nationalist movements); JOSHUA A. FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES 29 (1978) (identifying attractiveness of American culture, destruction of immigrant traditions by increasingly industrialized society, economic and social rewards for learning English, geographic mobility, emphasis on children, and "Old-World weariness" as possible explanations). *But see* Joseph Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 523 (1985) (noting disincentives to learning English among Spanish-speakers in United States).

38. *See* Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (condoning state's desire to preserve "homogeneous people" as legitimate goal); Yniguez v. Arizonans for Official English, 69 F.3d 920, 923 (9th Cir. 1995) (identifying *Meyer* as first of early Supreme Court

sis,[39] the Court in *Meyer v. Nebraska*[40] found unconstitutional a Nebraska law that made it illegal to teach a foreign language in a private or public primary school.[41] In spite of that simple holding, however, *Meyer* is a complicated, historically revealing decision. Even while invalidating the Nebraska law, the Supreme Court reinforced the assumptions and prejudices behind it, noting that "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries" made the motivation behind the law understandable.[42]

On the other hand, the Court hinted that the Constitution may protect some rights from language-based discrimination: "[T]he individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[43] Having made this broad assertion, however, the Supreme Court proceeded to rest its decision on a narrower set of rights: the fundamental rights of language teachers to pursue a chosen occupation and of parents to make educational decisions concerning their children.[44]

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cases concerning language), *cert. granted*, 116 S. Ct. 1316 (1996); *see also* William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 141–64 (1988) (discussing challenges to World War I language statutes in state courts).

39. *Meyer*, 262 U.S. at 399. At the time the Court decided *Meyer*, it had not developed its two-tiered substantive due process analysis. The language of the decision is similar to that of minimum scrutiny. *See id.* at 403 (stating that statute had no "reasonable" relation to any state goal). However, *Meyer* is viewed by the modern Court as one of a line of cases identifying fundamental due process rights, and claims asserting such rights now receive strict scrutiny. *See* Roe v. Wade, 410 U.S. 113, 152 (1973) (including *Meyer* in group of cases acknowledging fundamental privacy right); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (asserting that *Meyer* upheld fundamental rights to educate children and acquire knowledge).

40. 262 U.S. 390 (1923).

41. *Meyer*, 262 U.S. at 397.

42. *Id.* at 402.

43. *Id.* at 401; *see also* Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (stating that Constitution protects rights of those who do not speak English). Of course, neither decision protected a wholesale right to speak one's language of choice. Rather, these cases asserted that the rights of employment choice and childrearing extend to foreign-language speakers as well as to English-speakers. *See Meyer*, 262 U.S. at 400–01 (holding that Nebraska law restricting teaching of foreign languages in schools unconstitutionally interfered with occupation choices of language teachers and parents' educational choices for their children); *Tokushige*, 273 U.S. at 298–99 (declaring that Hawaiian law regulating teaching of foreign languages in private schools violated school owners' and parents' Fourteenth Amendment rights to choose "teachers, curriculum and textbooks").

44. *Meyer*, 262 U.S. at 401; *see also Tokushige*, 273 U.S. at 299 (striking Hawaiian law strictly limiting and regulating foreign private schools on basis of right to choose education for children). Nevertheless, some commentators read *Meyer* more broadly. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 988–89 (1979) (stating that *Meyer* protected right to family autonomy); William G. Ross, *A Judicial*

The Court's next ruling on language rights, *Yu Cong Eng v. Trinidad*,[45] closely followed the substantive due process analysis of *Meyer*.[46] However, the *Yu Cong Eng* Court also developed and partly relied upon an equal protection analysis in determining that a Philippine statute forbidding the use of the Chinese language for bookkeeping was unconstitutional.[47] In *Yu Cong Eng*, the Philippine legislature had passed a law requiring that business-owners keep books in either Spanish, any of the Philippine dialects, or English in order to detect alleged tax evasion by Chinese merchants.[48] Holding this to be unconstitutional, the Court identified a classification: the portion of the population that spoke Chinese, which was only one of many languages on the islands.[49] However, in this era prior to the explosion of equal protection cases of the 1960s, the Court did not identify a scrutiny-level for the classification.[50] Rather, the Court merely looked for a rational reason for the law and, finding none, overturned it, reiterating its holding in *Meyer* that the right to pur-

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Janus: Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 185–86 (1988) (arguing that "tenor" of *Meyer*'s holding includes expansion of personal liberties). Yet, this "tenor" has been of little service to language minorities. *See* Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 165 (1985) (noting that while *Meyer* was important decision in support of linguistic pluralism, it did not elevate foreign languages to status of English or entitle foreign students to instruction in their own language); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 802 n.124 (noting that *Meyer* may have suggested right to teach in foreign language, but later cases limit protection to instances where language is equal to race). However, the Supreme Court has relied on *Meyer* in deciding numerous due process cases in contexts other than language. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982) (protecting minimal education rights of illegal alien children); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (locating fundamental right to marry in Due Process Clause); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (extending right to marry to couples of mixed ethnicity); *Griswold*, 381 U.S. at 485 (finding right to privacy protects married couple's choice to use contraceptives).

45. 271 U.S. 500 (1926). This decision was decided when the Philippine islands were a protectorate of the United States and, therefore, subject to United States constitutional authority. *Id.* at 507. Because the Philippine government was not a state government, the Court could exercise independent judgment on the construction of its statute dealing with individual rights. *Id.* at 522–23. The pertinent portion of the Philippine Bill of Rights mirrored the federal Constitution's Fourteenth Amendment. *Id.* at 523.

46. *See Yu Cong Eng*, 271 U.S. at 526–27 (citing *Meyer* for proposition that legislature cannot arbitrarily interfere with occupational or educational choices).

47. *Id.* at 524–25.

48. *Id.* at 507–08.

49. *See id.* at 513–14 (noting that law was designed to detect Chinese tax evaders).

50. *See* Donald E. Lively, *Equal Protection and Moral Circumstances: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 518 n.271 (1991) (stating that Supreme Court first identified suspect classification status in 1944 in Korematsu v. United States, 323 U.S. 214, 216 (1944)).

sue a living is fundamental under the Due Process Clause.[51] In so doing, the Court protected the right to pursue a living, not the right to communicate in Chinese.[52]

The *Yu Cong Eng* Court, in discussing the accommodations that linguistically diverse societies must make, suggested that the size of the Chinese community in the Philippines played a role in its decision.[53] The Court noted that the Chinese had been on the island for a long time, and that Chinese merchants comprised sixty percent of the island's businesses.[54] In fact, the Court, in the same sentence as its holding, stated that the history of the Chinese in the Philippines and the extent of their business connections on the islands figured into the Court's decision that the Philippine statute was unconstitutional.[55] These interesting dicta suggest that where a language minority comprises a large percentage of the population, that minority might have some rights to its language.[56]

These two cases illuminate the problems raised by language minorities early in the twentieth century and tentatively identify the possible sources of Fourteenth Amendment protection for these minorities: the right to equal protection and the right to due process.[57] Recognizing that government classifications involving language may deserve equal protection review, these early cases left to later courts the difficult task of determining what sort of review is due. Acknowledging that state deprivation of a right or privilege based on language may implicate the right to due process, these cases left unanswered how far courts can or will go in protecting those rights, or whether perhaps courts will take the radical step of finding a right to language itself. Modern courts' answers to these unresolved questions, however, have been largely disappointing.

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51. *Yu Cong Eng*, 271 U.S. at 524–25. In this case, the Court identified a property interest in one's profession, which, coupled with the criminal penalties for violation of the law, brought the issue within the purview of substantive due process. *Id.*

52. *Id.* The Court further noted that nothing prevented the Philippine government from mandating that at least one copy of business records be kept in English, since the violation stemmed from prohibiting *any* records from being kept in Chinese. *Id.* at 525.

53. *See id.* at 511–12 (noting that Chinese comprised about 60% of commercial business in Philippines).

54. *Id.*

55. *Yu Cong Eng*, 271 U.S. at 524–25.

56. *See* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 802 n.124 (noting that *Meyer* and *Yu Cong Eng*, read broadly, may indicate existence of constitutional right to use language, at least in contexts of education and conducting business); *see also* Hernandez v. New York, 500 U.S. 352, 363–64 (1991) (acknowledging that, in some contexts, language may trigger strict scrutiny equal protection analysis).

57. *See supra* notes 21–23 and accompanying text.

III. EQUAL PROTECTION: CLASSIFYING THE CLASS

A. *Identifying Classifications*

Because a classification based on language is related to a classification based on race or ethnicity,[58] the Equal Protection Clause of the Fourteenth Amendment is a good place to begin in attempting to resolve these issues. That Clause, as well as the entire Amendment, reflects its drafters' fears that the states, particularly those that had seceded from the Union, would not guarantee all their citizens the most basic rights.[59] The Equal Protection Clause thus seeks to protect citizens from discrimination by ensuring that all citizens similarly situated are similarly treated.[60]

Despite the protections guaranteed by the Equal Protection Clause, not all state discrimination is unconstitutional. Courts give wide deference to state legislation that discriminates in economic or social realms, requiring only that the state have a legitimate reason for the act and that the act be rationally related to that reason.[61] Other state classifications,

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58. *See* Olagues v. Russoniello, 797 F.2d 1511, 1520 (9th Cir. 1986) (stating that people's national origins are often distinguished by languages they speak), *vacated as moot*, 484 U.S. 806 (1987); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 762 (noting 1990 census data indicated that 75% of Latinos speak Spanish); *see also* Christy Fisher, *Hispanics Indicate Enduring Preference for Native Language*, ADVERTISING AGE, Feb. 14, 1994, at 26 (noting that 77% of Latinos in United States speak some or all Spanish at home).

59. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1061 (1978) (stating that framers of Fourteenth Amendment wanted to ensure protections for freed slaves). The authors of the amendment did not specify exactly what rights, beyond equal protection of the laws, the Equal Protection Clause could protect. One commentator has opined that an equal-protection fundamental right is whatever the Court says is a fundamental right. *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 123 n.3 (1972); *see also* Daniel S. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. L. REV. 690, 706 (1995) (listing rights recognized as fundamental under equal protection as: right to travel between states; right to marry; right of access to courts; and right to vote).

60. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"); Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating general rule that, under Equal Protection Clause, persons in similar situations will be treated alike); New York City Transit Auth. v. Beazer, 440 U.S. 568, 611 (1979) (White, J., dissenting) (finding disproportionate imposition of burdens between similarly situated classes unconstitutional); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 120 n.77 (1973) (Marshall, J., dissenting) (asserting equal protection guarantees for those in similar positions); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (observing that Equal Protection Clause guarantees like treatment for individuals in similar circumstances).

61. *See Plyler*, 457 U.S. at 216 (noting court gives legislatures "substantial latitude" to make necessary classifications regarding social matters); *Rodriguez*, 411 U.S. at 28 (finding that classifications not composed of politically powerless or historically disadvantaged

such as gender, are given less deference by the courts. The Supreme Court has found these groups, labeled "quasi-suspect," to be deserving of heightened judicial review.[62] When a state discriminates against a quasi-suspect group, it must provide an important reason and demonstrate that its chosen means are substantially related to that reason.[63]

Some classifications, on the other hand, are suspect and thus presumptively unconstitutional.[64] Generally, courts will consider factors such as

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groups will not merit strict scrutiny); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that in economics and social welfare legislation, state classifications are valid if they have "reasonable basis"). However, sometimes the Court will use the rational-basis test to overturn a state act, applying it with what one scholar has termed, a "bite." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 18 (1972). This review places emphasis on the means-ends test, allowing for a narrower ground of decision. *Id.* at 20; *see also* Zobel v. Williams, 457 U.S. 55, 65 (1982) (invalidating Alaska law that rewarded citizens for residency by giving them benefits while denying benefits to new residents, even though Court failed to find suspect class or fundamental right implicated); *Plyler*, 457 U.S. at 219–24 (holding that education was not fundamental right and undocumented alienage not suspect classification, yet still striking Texas law forbidding education of alien children because of harmful effects it inflicted on "innocent" class—children). This analysis is similar to "the sliding scale approach" advocated by Justice Thurgood Marshall throughout his career. *See* Harris v. McRae, 448 U.S. 297, 344–45 (1980) (Marshall, J., dissenting) (advocating abandonment of two-tiered analysis); *Rodriguez*, 411 U.S. at 98–99 (Marshall, J., dissenting) (arguing that Court's equal protection analysis amounted to "spectrum of standards," with results depending on significance of interests at stake). Justice Stevens also viewed the Court's descriptions of its equal protection tests skeptically; he advocated a rationality test that would be applied to all claims in the same fashion and would involve scrutiny of the legitimacy of goals and neutrality of purpose. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

62. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (applying intermediate scrutiny to Massachusetts hiring preference plan that favored male applicants); Craig v. Boren, 429 U.S. 190, 197–204 (1976) (overturning law, under intermediate scrutiny, which prohibited sale of 3.2% beer to males, but not females, under 21 years of age); Reed v. Reed, 404 U.S. 71, 76 (1971) (striking Idaho probate code preferring men to women as estate administrators); *see also Plyler*, 457 U.S. at 218 n.16 (noting that Court applies intermediate scrutiny when "concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases").

63. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425 (1994) (stating that gender classifications require "exceedingly persuasive" justifications) (quoting *Feeney*, 442 U.S. at 273); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny to claim of admissions discrimination in all-female nursing school).

64. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 576 (4th ed. 1991) (stating that classifications based on race or nationality are presumed suspect because of courts' views of Fourteenth Amendment and history surrounding it, and, further, that classifications based on alienage are also presumed suspect, although not as strictly scrutinized as race or nationality classifications); *see also Feeney*, 442 U.S. at 272 (recognizing that certain classifications "supply a reason to infer antipathy") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

historical discrimination, insularity of the group, and immutability of the characteristic used as the basis of a classification to determine whether a group is suspect.[65] Thus, state actions that facially discriminate based on race, national origin, and alienage receive the courts' most stringent review.[66] The state must show a compelling purpose for discriminating against these groups and must demonstrate that the challenged act is fitted narrowly to achieving that purpose.[67] In these cases, the courts often look for less discriminatory alternatives available to the state, because if such alternatives are available, the discrimination is not narrowly fitted to the state's compelling reason.[68] However, when plaintiffs challenge facially neutral laws that have discriminatory effects on suspect classes, the courts place on those plaintiffs a heightened burden: they must

65. *See* United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938) (introducing idea that claims by some "discrete and insular minorities" might receive closer judicial review than those protesting economic or social legislation); *see also Plyler*, 457 U.S. at 216–17 & 218 n.14 (listing traditional indicia of suspectness: classifications that are more likely than others to reflect prejudice; classifications irrelevant to proper legislative goal; and classifications involving groups in position of "political powerlessness"); Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 939 (1991) (listing Supreme Court's criteria for determining if class is suspect: that class is discrete and insular; that class has disability over which it has no control; that class's defining characteristic bears no rational relation to legitimate state purpose; that class has suffered history of discrimination; and that there is stigma attached to being member of class).

66. *See* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986) (identifying classifications based on race, alienage or national origin as suspect); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (agreeing that race, alienage, and national origin are "inherently suspect" classifications). In addition to race and national origin, in some cases the Court has found alienage to be a suspect classification. *See* Bernal v. Fainter, 467 U.S. 216, 227 (1984) (protecting aliens from exclusion from notary public positions); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (finding that city application of ordinance regulating laundries unconstitutionally discriminated against Chinese aliens); *see also Plyler*, 457 U.S. at 219–20 (refusing to give class of *illegal* aliens heightened scrutiny, but providing protection from denial of minimal education for their children).

67. *See Plyler*, 457 U.S. at 216–17 (stating that under strict scrutiny, government act must be closely fitted to achieving compelling government purpose); *Feeney*, 442 U.S. at 272 (asserting that discrimination against suspect classes may only be upheld for extraordinary reasons under strict scrutiny review); *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (formulating early strict scrutiny standard for racial classifications).

68. *See* United States v. Paradise, 480 U.S. 149, 199 (1987) (O'Connor, J., dissenting) (stating that, under strict scrutiny, proposed state act must be more narrowly tailored to purpose than any other remedy); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in judgment and dissenting in part) (holding that, under strict scrutiny, state act can only survive if there is no alternative).

demonstrate that the discrimination was intentional rather than coincidental.[69]

Nonetheless, language minorities making equal protection claims are generally stopped well before having to prove intent, because although language minorities share many of the traits of suspect classes, language discrimination nearly always receives minimal scrutiny.[70] While there is universal agreement that language is *related* to national origin, there is widespread belief that language is not *equal* to national origin.[71] Further, the Supreme Court has held that a state may legitimately discriminate on the basis of a trait that is connected to a suspect or quasi-suspect group, so long as that trait is relevant to the state action.[72] In language discrimi-

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69. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (necessitating proof of discriminatory intent to sustain equal protection claim); Washington v. Davis, 426 U.S. 229, 246 (1976) (requiring demonstration of purposeful discrimination in admission tests for police force); Jefferson v. Hackney, 406 U.S. 535, 547–49 (1972) (requiring showing of discriminatory intent in distribution of welfare funds); United States v. Watson, 953 F.2d 895, 898 (5th Cir. 1992) (denying plaintiff's claim of disparate impact of crack cocaine sentences on minorities because plaintiff had not alleged discriminatory intent in formation of Sentencing Guidelines); *see also* Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 712 (1995) (noting that discriminatory intent requirement illustrates that equal protection guarantees are designed to guarantee access to political processes); Jeffery A. Kruse, *Substantive Equal Protection Analysis Under* State v. Russell, *and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791, 1792 (1993) (noting that intent requirement excludes many valid equal protection claims of adverse impact on minorities).

70. *See* Hernandez v. New York, 500 U.S. 352, 371–72 (1991) (allowing language-based juror challenge under minimal scrutiny test where no race/language nexus exists); Pabon v. McIntosh, 546 F. Supp. 1328, 1340 (E.D. Pa. 1982) (holding that because language is not directly related to specific national origin, minimal scrutiny is appropriate standard of review).

71. *See* Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983) (finding language, alone, is not suspect classification), *cert. denied*, 466 U.S. 929 (1984); Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (holding that language classifications are not equal to those made on basis of nationality or race); Smothers v. Benitez, 806 F. Supp. 299, 306 (D.P.R. 1992) (noting courts generally avoid analysis of language under equal protection, but when they conduct such analysis, require language/national origin nexus); Flores v. State, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995) (en banc) (holding that language is not suspect classification), *cert. denied*, 116 S. Ct. 716 (1996); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 486 (1994) (noting that most courts which have considered language issues have found that language classifications alone do not merit strict or heightened scrutiny).

72. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441–42 (1985) (holding that courts are reluctant to invalidate state classifications when made on basis of characteristics relevant to state interest); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (commenting that courts should not apply strict scrutiny where legislature has discriminated based on relevant characteristic). Of course, many language minori-

nation cases, language is often held to be relevant to the state's asserted purpose.[73] In fact, in the latest Supreme Court case to address equal protection rights for language minorities, the Court stated that language ability could justify peremptory challenges, in part because language ability could be relevant to a potential juror's ability to accept court translations of testimony.[74]

B. Hernandez v. New York: *The Supreme Court's Latest Word on Language*

In *Hernandez v. New York*,[75] a criminal defendant claimed that two prospective jurors had been excused during voir dire examination merely because they spoke Spanish.[76] Relying on *Batson v. Kentucky*,[77] which

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ties claim discriminatory intent against race or national origin groups lurks behind English-only legislation and proposals. *See* Kathryn K. Imahara & Ki Kim, *English Only—Racism in Disguise: An Analysis of* Dimaranan v. PVHMC, 23 U. WEST. L.A. L. REV. 107, 108–09 (1992) (linking advent of English-only proposals to anti-immigration movements); Kenneth L. Karst, *Essay: Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 352 (1986) (asserting that language differences provide both way to rationalize discrimination and means of accomplishing it); Joseph Leibowicz, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 538 (1985) (arguing that immigration restriction was goal of movements to limit foreign language use at beginning of century); Michael Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 326 (1991) (stating that growing popularity of English-only legislation is probably linked to increased number of immigrants); Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657, 661 (1987) (tracing new interest in English-only laws to fear of new wave of immigration); Mike Dorning & Melita M. Garza, *English Language Gains New Meaning in National Politics*, CHI. TRIB., Sept. 19, 1995, at 1 (quoting Edward Chen, staff attorney for ACLU of Northern California's Language Rights Project: "You cannot disassociate the whole language movement from the backlash and movement against immigration."); *USA Doesn't Need 'Official Language'*, USA TODAY, Oct. 15, 1990, at 6A (arguing that English-only laws are designed to exclude and will divide country by encouraging bigotry).

73. *See Hernandez*, 500 U.S. at 362 (upholding juror exclusion on basis of language because English deficiency might result in jurors' inability to accept court translations); Pemberthy v. Beyer, 19 F.3d 857, 862 (3d Cir.) (accepting prosecutor's explanation that Spanish-speaking jurors would have trouble accepting translation, and allowing them to be excluded on that basis), *cert. denied*, 115 S. Ct. 439 (1994); *Frontera*, 522 F.2d at 1219 (stating that because Civil Service system required use of English language, administration of Civil Service examinations in English was reasonable); *Flores*, 904 S.W.2d at 131 (stating that language classification was relevant to goal of providing meaningful probation).

74. *See Hernandez*, 500 U.S. at 370 (finding "legitimate" prosecutor's explanation that he excused Spanish-speaking jurors for fear they would not accept official translation of proceedings).

75. 500 U.S. 352 (1991).

76. *Hernandez*, 500 U.S. at 356.

77. 476 U.S. 79 (1986).

held that challenging prospective jurors on the basis of race violated the equal protection rights of criminal defendants and voir dire members,[78] the defendant claimed that the prosecutor had violated *Batson* by challenging these language minorities.[79]

According to *Batson*, when a defendant makes a prima facie case that a prosecutor has exercised a peremptory challenge on the basis of race, the prosecutor must then present a race-neutral reason for that challenge.[80] If the prosecutor does not sufficiently meet this burden, the strike will not be allowed.[81] In *Hernandez*, the prosecutor justified his challenges of the Spanish-speaking voir dire members by arguing that he feared the Spanish-speaking jurors would be unable to accept the official court translation of Spanish testimony.[82] The prosecutor further argued that because the victims of the crime were Latino, he had no motive to discriminate against jurors who might actually be sympathetic to his case.[83]

The plurality of the Court accepted the prosecution's justifications, holding that the prosecutor's challenge did not divide jurors racially, but according to whether they would have difficulty accepting an English translation.[84] Because each group included both Latinos and non-Latinos, there was no division along racial lines.[85] This holding indicates that the present Supreme Court will require a plaintiff to show a connection between language and race or national origin before finding a language classification suspect and subject to strict scrutiny.[86]

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78. *Batson*, 476 U.S. at 84–87. This principle has since been extended to gender-based juror discrimination. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1425 (1994).

79. *Hernandez*, 500 U.S. at 355.

80. *Batson*, 476 U.S. at 97.

81. *See id.* at 99–100 n.24 (noting that trial court may either reinstate improperly challenged jurors or reelect new jury from different panel).

82. *Hernandez*, 500 U.S. at 357 n.1. The prosecutor said:

> I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even had to ask the [j]udge to question them on that, and their answers were—I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it.

Id.

83. *Id.* at 357.

84. *Id.* at 361.

85. *Id.*

86. *See Hernandez*, 500 U.S. at 371 (stating, "[w]e would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors"); *see also* Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (en banc) (Meyers, J., concurring) (stating that discrimination based on language that is pretext for race discrimination is unconstitutional), *cert. denied*, 116 S. Ct. 716 (1996); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection*

However, in dicta remarkably like that in *Yu Cong Eng*, which discussed the size of the Chinese community in the Philippines,[87] Justice Kennedy, writing for the plurality, warned of the dangers of racial stereotypes in a community with a large, Spanish-speaking Latino population.[88] Justice Kennedy stated that a trial judge could take these contextual matters into account when determining whether a prosecutor's challenge amounted to intentional discrimination on the basis of race.[89] Because

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Clause: When Is Language a Pretext for Race or Ethnicity?, 74 B.U. L. REV. 481, 487 (1994) (arguing that language/race nexus is required in order to merit strict scrutiny). *But see Hernandez*, 500 U.S. at 375 (O'Connor, J., concurring) (stating that, in cases involving juror discrimination, language discrimination could never merit strict scrutiny, no matter how closely related to race); Pemberthy v. Beyer, 19 F.3d 857, 871 (3d Cir.) (holding juror challenges made only on basis of language are not invalid under *Batson*), *cert. denied*, 115 S. Ct. 439 (1994).

87. Yu Cong Eng v. Trinidad, 271 U.S. 500, 511–12 (1925).

88. *See Hernandez*, 500 U.S. at 363–64 (noting that language could be pretext for race-based peremptory challenges). Later in the decision, Kennedy wrote, "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." *Id.* at 371.

89. *Id.* at 371–72. *But see id.* at 375 (O'Connor, J., concurring) (arguing that equal protection strict scrutiny does not apply to cases in which race\language nexus exits, but only to cases of intentional race discrimination). Part of the Court's problem here may be the "slippery" nature of race definitions. *See id.* at 371 (plurality opinion) (declining to decide "difficult question of the breadth with which the concept of race should be defined for equal protection purposes"); United States v. Ortiz, 897 F. Supp. 199, 203 (E.D. Pa. 1995) (discussing difficulty of classifying Latinos and determining that Latino "is not a biological characteristic but a psychological characteristic as to how one defines himself or herself"); Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 676–80 (1975) (discussing elusiveness of race definitions); Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 20 (1992) (noting Court's "overly narrow" interpretation of 'race-neutrality' and ambiguity over its definition of 'race'); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 803–04 (arguing for definition of race that would "acknowledge that ethnic and racial identity amount to more than one's skin color and the birth place of one's ancestors"). Of course, two general problems with equal protection have been determining a "baseline" for equality and determining just "how equal" individuals should be. In addressing the first question, consider that the framers of the Fourteenth Amendment debated and dismissed as ridiculous the idea that the protection would extend to women, who were not "similarly situated" with men. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 306–07 (1990) (stating that proponents of Fourteenth Amendment suggested that because women did not belong to same "class" as men, they would not have to be treated equally to men, only to other women). For an example of disagreement over the second question, consider that in *Ex parte* Virginia, a decision forbidding race-based juror exclusion, Justice Field noted that equal protection is not the same as equal participation. 100 U.S. 339, 367 (1879) (Field, J., dissenting). Justice Field pointed out that although women were not allowed to participate in the political process, they were nonetheless equally protected under the Fourteenth Amendment. *Id.*

the plurality accepted the prosecution's justification for the challenges, however, it never reached the question of whether language, by itself, could trigger a suspect classification.[90]

C. *Confusion in the Lower Courts: Is There a Nexus Requirement?*

Thus, the *Hernandez* Court did little to resolve confusion in the lower courts regarding which protections and rights should be afforded language minorities under the Equal Protection Clause.[91] No lower court has found language, by itself, to be a suspect classification.[92] However, a few courts have found a sufficient connection between language and na-

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90. *See* Hernandez, 500 U.S. at 371 (stating that Court's holding does not settle issue of when language-based discrimination could be viewed as pretext for racial discrimination). In fact, Justice O'Connor, writing a concurrence joined by Justice Scalia, explicitly rejected this idea and seemed, as well, to reject Justice Kennedy's suggestion that a race/language nexus could trigger strict scrutiny. *See id.* at 375 (O'Connor, J., concurring) (arguing that only classifications directly based on race and national origin will support *Batson* challenge). Moreover, the plurality's holding strongly suggests that some relationship to race, even if tenuous, will be required. *See id.* at 371 (holding that if reason for challenge is other than race, challenge is race neutral); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 487 (1994) (arguing that victims of language discrimination must be able to show nexus between language and suspect classification); *see also* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 761 (asserting that in *Hernandez*, Supreme Court "effectively permitted the government arbitrarily to exclude all Spanish-speaking prospective jurors in every case where any witness will testify in Spanish"). Following *Hernandez*, the United States Court of Appeals for the Third Circuit addressed this issue and held that peremptory challenges based solely on foreign language ability would not receive strict scrutiny. *Beyer*, 19 F.3d at 871.

91. *Compare* Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (finding equal protection violation because investigation singled out specific language, thus triggering race/language connection), *vacated as moot*, 484 U.S. 806 (1987), *with* Pagan v. Dubois, 884 F. Supp. 25, 27 (D. Mass. 1995) (opining in dicta that language-based discrimination claims should not succeed).

92. *See* Pemberthy v. Beyer, 19 F.3d 857, 870 (3d Cir.) (asserting that claims against peremptory juror challenges based on language do not merit strict or heightened scrutiny), *cert. denied*, 115 S. Ct. 439 (1994); Soberal-Perez v. Heckler, 717 F.2d 36, 42 (2d Cir. 1983) (finding that there is no equal protection violation when notices denying Social Security benefits are not sent in Spanish, because language, alone, is not suspect classification), *cert. denied*, 466 U.S. 929 (1984); Guadalupe Org., Inc. v. Tempe Elem. Sch. Dist. No. 3, 587 F.2d 1022, 1026 n.3 (9th Cir. 1978) (stating that classification of students based on language ability in denial of remedial, bilingual instruction will not receive strict scrutiny); Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (finding that language classifications are not equal to those made on basis of nationality or race); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (subjecting language-based distinction to minimal scrutiny); Pabon v. McIntosh, 546 F. Supp. 1328, 1340 (E.D. Pa. 1982) (holding that prison's failure to provide courses in Spanish does not implicate suspect classification, because language is not directly related to national origin).

tional origin to trigger strict scrutiny.[93] Those cases in which plaintiffs have made successful claims often involved blatant discrimination against a particular language minority rather than the denial of benefits or of notice in a language other than English.[94] In addition, courts giving language classifications strict scrutiny have generally done so because the discrimination has been based on proficiency in a specific foreign language rather than a general deficiency in English.[95]

In *Olagues v. Russoniello*,[96] for example, the United States Court of Appeals for the Ninth Circuit considered whether a voter registration fraud investigation that singled out Spanish-speaking and Chinese-speaking foreign-born voters violated the Equal Protection Clause.[97] In holding that it did, the court distinguished the case from cases involving the distribution of benefits by observing that, in the latter cases, no specific

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93. *See Olagues*, 797 F.2d at 1521 (holding that "specific" classifications of Spanish and Chinese speakers will trigger strict scrutiny, while general classification of "non-English speakers" may not); Asian Am. Bus. Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989) (holding that person's language flows from his or her national origin); Smothers v. Benitez, 806 F. Supp. 299, 306 (D.P.R. 1992) (finding that when language, which includes surnames, accents, and behavior patterns, is used to discriminate against certain groups, language is indicia of national origin); *see also* Thongvanh v. Thalacker, 17 F.3d 256, 259 (8th Cir. 1994) (asking prison to show merely that not allowing prisoner to correspond to his family in Lao is reasonably related to legitimate penological goal, but finding that presence of less discriminatory alternatives rendered policy unconstitutional). The *Benitez* court added that laws without the language/national origin nexus should, if they have a sufficient adverse impact on minorities, be evaluated under the intermediate standard of review. *Benitez*, 806 F. Supp. at 308–09.

94. *Compare* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking law that discriminated against foreign language teachers), *with Soberal-Perez*, 717 F.2d at 43 (refusing to order state to issue Social Security benefit notices in Spanish). The recent Texas cases illustrate this distinction nicely. Part of Mr. Flores's claim rests on the assumption that the county in which he was sentenced should provide rehabilitative services in Spanish to avoid language discrimination. *See* Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (en banc) (noting Mr. Flores's claim that not having alcohol treatment in Spanish disproportionately impacts Latinos), *cert. denied*, 116 S. Ct. 716 (1996). On the other hand, the case of Ms. Laureno, who was ordered to stop speaking Spanish to her daughter, involves discrimination on the basis of language, and a remedy would not impose an affirmative duty on the state, other than to avoid such discrimination. *See supra* note 15 and accompanying text.

95. *Compare Olagues*, 797 F.2d at 1521 (declaring investigation into Spanish- and Chinese-speaking voters unconstitutional), *and Asian Am. Bus. Group*, 716 F. Supp. at 1332 (finding ordinance discriminating against language-minority advertising violates equal protection), *with* Hernandez v. New York, 500 U.S. 352, 361 (1991) (allowing peremptory challenges to prospective jurors because of ability to speak Spanish), *and Flores*, 904 S.W.2d at 131 (upholding denial of probation based on inability to speak English).

96. 797 F.2d 1511 (9th Cir. 1986).

97. *Olagues*, 797 F.2d at 1521.

foreign languages had been singled out for discrimination.[98] The investigation under consideration, on the other hand, specified languages, thus unconstitutionally making distinctions based on nationality.[99]

Three years after the *Olagues* decision, the United States District Court for the Central District of California, in *Asian American Business Group v. City of Pomona*[100] rejected the requirement that a *specific* language be the basis of discriminatory treatment to establish a race/language nexus under the Equal Protection Clause.[101] The court struck a city ordinance, aimed at advertisements in the Chinese language, that mandated that all commercial signs with language in "foreign alphabetical characters"

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98. *Id. Olagues*, however, invites a broader reading that would suggest that language distinctions are generally based on national origin. *See id.* at 1520 (stating that "an individual's primary language skill generally flows from his or her national origin"). At least one commentator, however, believes the *Olagues* test is not strict enough. *See* Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 490 (1994) (arguing that *Olagues* test, which focuses on objective quality of discrimination and whether it amounts to classification traditionally viewed as suspect, should be replaced by test which focuses on whether state actor subjectively intended to discriminate against suspect class). The Supreme Court has refused to hold unconstitutional trait-based discrimination related to gender, holding that refusal to provide disability insurance for pregnant women did not discriminate against all women, because not all women became pregnant. Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1979). The Court contended that the classification benefitted all people who were "not pregnant," including women as well as men. *Id.* Thus, the *Flores* court could no more equate language to race than the *Geduldig* Court could equate pregnancy to gender. *See Flores*, 904 S.W.2d at 131 (placing Mr. Flores in class of convicted drunk drivers who could not speak English, rather than in class of Latinos). The class allegedly unharmed, comprised of English-speakers, could include people of Spanish descent, and the class allegedly harmed, non-English speakers, could include people from all races. *Cf.* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 764 n.8 (observing that Congress so objected to *Geduldig* decision, it passed Pregnancy Disability Act, making discrimination on basis of pregnancy equal to gender discrimination). For an uncharacteristically broad interpretation of race that might include such race-based traits as language, see St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987), where the Supreme Court found that people of "Arabian" ancestry may claim racial discrimination under Title VII and identified suspect classes for Title VII purposes as "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic *characteristics*." *Al-Khazraji*, 481 U.S. at 613 (emphasis added). Concurring in the *Al-Khazraji* decision, Justice Brennan asserted that there would be no bright line between discrimination based on ancestry or *ethnic characteristics* and discrimination based on race or national origin. *Id.* at 614 (Brennan, J., concurring) (emphasis added).

99. *Olagues*, 797 F.2d at 1520.

100. 716 F. Supp. 1328 (C.D. Cal. 1989).

101. *See id.* at 1332 (stating that act prohibiting use of foreign alphabetical characters is discrimination against national origin, even if specific national origin is not named).

maintain English alphabetical characters on at least one-half the sign.[102] The ordinance was found unconstitutional even though it did not single out a particular language or race for discriminatory treatment.[103] The court reasoned that by only striking state acts that discriminate against specific languages, cities and states could avoid strict scrutiny by making a general classification against non-English speakers that nevertheless discriminates against targeted language groups.[104]

In contrast to these cases, the great majority of language discrimination claims deal with a service or benefit denied to the claimant because of an English deficiency.[105] Because such policies do not discriminate against any particular racial or minority group, and because members of suspect classifications who are able to speak English are not harmed by such policies, courts generally have not subjected these classifications to strict scrutiny.[106] For example, in *Soberal-Perez v. Heckler*,[107] the United States Court of Appeals for the Second Circuit, using the rational-basis test, affirmed the lower court's holding that the state Social Security Administration did not violate the equal protection rights of non-English speakers by refusing to provide notice of the withdrawal of benefits in

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102. *Id.* at 1332. The court found that two equal protection principles had been violated. *Id.* First, it held that a fundamental interest, free expression, had been violated by an impermissible classification. *Id.* Second, it held that the ordinance discriminated on the basis of national origin. *Id.*

103. *Id.* at 1332–33.

104. *Asian Am. Bus. Group*, 716 F. Supp. at 1332–33; *see also Benitez*, 806 F. Supp. at 308 (suggesting that there may be cases where language alone, without national origin nexus, requires heightened scrutiny). The *Benitez* court stated that forbidding a person from speaking his or her native language (in this case, English) requires, unfairly, that everyone speak one language, although some people favor another. *Id.* This distinction between general and specific language classifications explains the result in *Flores*, in which the Texas Court of Criminal Appeals found that the denial of Mr. Flores's probation was not based on the fact that he spoke only Spanish, but on the fact that he did not speak English. *Flores*, 904 S.W.2d at 130.

105. *See, e.g., Soberal-Perez*, 717 F.2d at 42 (rejecting claim that failure to provide notice of withdrawal of Social Security benefits in Spanish violates Equal Protection Clause); *Frontera*, 522 F.2d at 1219 (holding that Civil Service is not required to give tests in foreign languages); *Carmona*, 475 F.2d at 739 (finding no right to notice of denial of unemployment benefits in claimant's language); *see also Flores*, 904 S.W.2d at 131 (rejecting Mr. Flores's claim that failure to provide alcohol rehabilitation in Spanish language adversely affects Latinos).

106. *See, e.g., Tempe*, 587 F.2d at 1026 n.3 (denying request for bilingual, bicultural education, in part because failure to provide these classifies students on basis of linguistic ability rather than race); *Carmona*, 475 F.2d at 739 (denying request to have unemployment notices written in Spanish); *Pagan*, 884 F. Supp. at 28 (suggesting that prisoner's right to Spanish-speaking medical providers and counselors is not protected by Constitution).

107. 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

Spanish.[108] In its decision, the lower court noted that the regulation may have had a disproportionate adverse impact on Latinos, but that this impact was not intentional and, therefore, not unconstitutional.[109]

Language minorities in the criminal justice system have faced the same difficulties in making equal protection claims.[110] In *Pabon v. McIntosh*,[111] for example, the United States District Court for the Eastern District of Pennsylvania refused to consider a claim by Spanish-speaking prisoners that their equal protection rights were violated by the prison's refusal to provide educational programs in Spanish.[112] The court held that the failure to provide multilingual education did not trigger strict scrutiny because the absence of multilingual education injured not just Spanish-speaking prisoners, but all prisoners who did not speak English, regardless of their national origin.[113] Similarly, the United States District Court for the District of Massachusetts in *Pagan v. Dubois*[114] refused to certify a class of Latinos who claimed that the failure to provide medical treatment and counseling for HIV-positive Latino prisoners in Spanish violated the prisoners' equal protection rights.[115] Although the court recognized in theory the opportunity for individual language-minority plaintiffs to make this claim,[116] in dicta surely designed to discourage future suits, the court then suggested that equal protection meant equality, not

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108. *Soberal-Perez*, 717 F.2d at 41–42.

109. Soberal-Perez v. Schweiker, 549 F. Supp. 1164, 1174 (E.D.N.Y. 1982), *aff'd sub nom.* Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

110. *See* Sisneros v. Nix, 884 F. Supp. 1313, 1333 (S.D. Iowa 1995) (denying prisoner's claim that policy of not allowing correspondence in Native American language violated equal protection as applied). *But see Thongvanh*, 17 F.3d at 259 (stating that prison policy of denying prisoner correspondence in his native language of Lao could impinge upon his equal protection rights because prison had reasonable alternatives); *cf.* Procunier v. Martinez, 416 U.S. 396, 413–14 (1974) (limiting censorship of prisoner mail to cases where substantial governmental interest, unrelated to goal of suppression, exists). Violations of rights that are related to prison efficiency and security concerns are subjected only to a "reasonable relationship test," which asks if the regulation is "rationally related to legitimate penological interests." Washington v. Harper, 494 U.S. 210, 223 (1990) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)); *see also Sisneros*, 884 F. Supp. at 1323 (applying standard to prison mail censorship). Generally, prisoners retain due process, freedom of speech and religion, freedom from racial discrimination, and Eighth Amendment rights. Jill A. Schaar, *Prisoners' Fourth Amendment Right to Privacy: Expanding a Constricted View*, 22 HOUS. L. REV. 1065, 1066–67 (1985).

111. 546 F. Supp. 1328 (E.D. Pa. 1982).

112. *Pabon*, 546 F. Supp. at 1340.

113. *Id.*

114. 884 F. Supp. 25 (D. Mass. 1995).

115. *Pagan*, 884 F. Supp. at 28.

116. *Id.*

favoritism.[117] The court asserted that language-discrimination claims encourage cultural "balkanization."[118]

Clearly, courts in modern equal protection cases have struggled with the issue of whether language minorities merit strict scrutiny, either because their national origin strongly correlates with the language they speak, or because language, by itself, raises similar concerns as those raised by discrimination based on race.[119] Currently, the Supreme Court's position suggests that while a language minority's equal protection claim may succeed if the claim establishes a sufficient nexus between the language discrimination and the state's animosity toward race or national origin, language by itself will not trigger strict scrutiny.[120]

IV. Due Process and Fundamental Rights: No Room Under the Penumbra?

A. *Fundamental Rights and Finding a Place to Stand*

Because of the treacherous path language minorities face in making equal protection claims against a state, their cases should also be evaluated for the presence of an implicated fundamental right, which also would trigger strict judicial review.[121] Many of these rights are explicitly stated in the Constitution although they can be complicated in application.[122] Among these are rights incorporated from the Bill of Rights into

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117. *Id.*

118. *Id.* at 27.

119. *See, e.g.*, *Hernandez*, 500 U.S. at 363–64 (holding that language may, in some circumstances, be surrogate for race); *Beyer*, 19 F.3d at 870 (stating language-based juror discrimination is not racial discrimination); *Olagues*, 797 F.2d at 1521 (finding race is equal to language where discrimination is on basis of particular language); *Benitez*, 806 F. Supp. at 308–09 (holding that language discrimination must be aimed at race or national origin to be suspect, but where no nexus exists, might merit intermediate scrutiny).

120. *See Hernandez*, 500 U.S. at 371 (holding that while juror challenge based on reason other than race will always be race-neutral, use of language as surrogate for race may trigger strict scrutiny).

121. *See, e.g.*, Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995) (relying on First Amendment to invalidate English-only amendment to Arizona's constitution), *cert. granted*, 116 S. Ct. 1316 (1996); Sisneros v. Nix, 884 F. Supp. 1313, 1323 (S.D. Iowa 1995) (finding First Amendment rights implicated in prison policy against foreign-language correspondence).

122. *See* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781, 785 (1994) (stating that fundamental rights include those explicitly enumerated in Constitution and those Court has recognized as necessary to liberty); Ronald Dworkin, *The Concept of Enumerated Rights: Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. Chi. L. Rev. 381, 381–82 (1992) (observing existence in Constitution of "concrete" rights, rights of "medium abstraction," and abstract rights).

the Due Process Clause of the Fourteenth Amendment[123] to protect individuals against state action impinging on those rights.[124] For example, the right to free speech is somewhat self-defining and easy to locate in the Constitution, as is the right to freely exercise one's religion.[125] Language minorities, in making a discrimination claim against the federal or state government, may sometimes successfully avail themselves of these explicit rights.[126] In *Yniguez v. Arizonans for Official English*,[127] for example, the United States Court of Appeals for the Ninth Circuit held that Arizona's English-only constitutional amendment violated free speech rights guaranteed by the First Amendment.[128] Likewise, in *United States v. Mayans*,[129] the Ninth Circuit also held that the Fifth Amendment guaranteed to defendants the right to have interpreters at critical stages of criminal proceedings.[130]

The Due Process Clause also protects a more nebulous set of substantive rights, which the Supreme Court has deemed "fundamental."[131]

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123. *See* U.S. CONST. amend. XIV, § 1 (stating that "[n]o person shall be deprived of life, liberty, or property, without due process of law").

124. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (incorporating right to jury trial); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (incorporating right to counsel at trial); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating exclusionary rule for illegally seized evidence); *see also* Near v. Minnesota, 283 U.S. 697, 707 (1931) (incorporating right to free speech).

125. *See* U.S. CONST. amend. I (protecting explicitly rights of free speech and exercise of religion); JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 382–83 (4th ed. 1991) (describing incorporation doctrine as means for courts to replace vague substantive due process, based on natural law, with specific protections enumerated in Bill of Rights).

126. *See Yniguez*, 69 F.3d at 924 (holding that Arizona's English-only amendment violated First Amendment free speech rights); United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994) (stating that Fifth Amendment mandates provision of interpreter at trial).

127. 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996).

128. *Yniguez*, 69 F.3d at 924.

129. 17 F.3d 1174 (9th Cir. 1994).

130. *See Mayans*, 17 F.3d at 1181 (explaining that defendant's Fifth Amendment right was violated when interpreter was withdrawn).

131. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 931 (1988) (noting fundamental rights involve ambiguity and vagueness); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1031–32 (1979) (attributing right of travel to structure of Constitution, but right to privacy and family rights to "naked judicial judgment"). Technically, the Fourteenth Amendment protects two sets of fundamental rights: due process rights and equal protection rights. In addition to ensuring a right to proper procedure, *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing factors for balancing test for procedural due process analysis), due process also protects the substantive rights of life, liberty, and property, as well as rights associated with personal privacy and family decision making. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978) (affirming freedom to marry as due process right and extending equal protection analysis to state classifications burdening that right); Roe v. Wade, 410 U.S. 113, 155–56

These rights emerged from the shadows of the Bill of Rights, and their elusiveness is coupled with the Supreme Court's traditional reluctance to identify new substantive or 'positive' rights in a Constitution that putatively guarantees only 'negative' rights.[132]

B. *Due Process: What Duty?*

The bases for these substantive due process rights are difficult to locate.[133] Undoubtedly, the idea that individuals possess basic rights vis-à-

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(1973) (finding right to abortion within privacy right); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (acknowledging right to purchase contraceptives). Next, the Equal Protection Clause, in addition to affirmatively guaranteeing the right to equal protection of the laws, protects the rights of classes of individuals in the areas of interstate travel, access to the courts, and voting. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (asserting that "fundamental fairness" requires meaningful access to courts); Zobel v. Williams, 457 U.S. 55, 57, 65 (1982) (holding that discrimination between old state residents and new state residents violates right to migrate); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (holding state may not use individual wealth to keep citizens from voting). For a detailed discussion of the source of the split between the two sets of fundamental rights, see Viktor Mayer-Schonberger, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 How. L.J. 287 *passim* (1990). Because Mr. Flores's putative claims arise from the Due Process Clause, this Comment focuses on case law analyzing that Clause. An Equal Protection Clause fundamental rights analysis would be identical: an act discriminating against a language minority that impinges on *any* fundamental right should receive strict scrutiny. *See* Gomez v. Myers, 627 F. Supp. 183, 185 (E.D. Tex. 1985) (holding that refusing to accept prisoner's pleading, written in Spanish, violated his equal-protection fundamental right of access to courts). However, most courts considering the issue have found no affirmative fundamental rights for language minorities based on their language under the Equal Protection Clause. *See* Guadalupe Org., Inc. v. Tempe Elem. Sch. Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978) (finding no fundamental right to bilingual or bicultural education for language minorities); Frontera v. Sindell, 522 F.2d 1215, 1220 (6th Cir. 1975) (finding no equal protection right to public employment and thus no state duty to provide Spanish interpretation of Civil Service exam). Nevertheless, where an *acknowledged* equal-protection fundamental right, such as access to the judicial system, is at stake, the result is different. *See* Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) (suggesting prison may have to accommodate prisoner's "linguistic skills" in staffing law library). Under equal protection analysis, benefits that the government is not bound to grant initially must still be distributed on equal terms once offered. *See* Shapiro v. Thompson, 394 U.S. 618, 632–33 (1969) (holding that state may not classify citizens by length of residency for purposes of distributing welfare benefits); Douglas v. California, 372 U.S. 353, 356–58 (1963) (stating that access to appellate courts for convicted criminals cannot be denied on basis of indigency).

132. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (characterizing Constitution as charter of negative rights); Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2272 (1990) (noting that courts maintain notion that Constitution only imposes negative duty on government to refrain from depriving citizens of rights).

133. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (admitting that some due process rights have "little or no textual support" in Constitution); Viktor Mayer-Schonberger,

vis their government arises from early notions of natural law.[134] In the early part of the century, courts increasingly found in the Due Process Clause a textual basis for these rights.[135] Initially, this clause protected the rights most central to a newly industrialized nation: the right to contract and to own property.[136] The Supreme Court relied on these rights to strike a spate of state legislation aimed at improving the lot of Depression-era workers in the 1930s.[137] However, the ascendancy of positivist legal theory and the concomitant retreat from natural law theory effectively eliminated the Court's willingness to interfere with economic regulation on substantive due process grounds.[138]

Substantive Due Process and Equal Protection in the Fundamental Rights Realm, 33 HOW. L.J. 287, 288 (1990) (listing natural law, Fifth Amendment, Due Process and Equal Protection clauses of Fourteenth Amendment as alternately suggested sources of substantive due process rights). *But see* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (arguing that substantive due process is more firmly rooted in Constitution than commonly believed).

134. *See In re* Winship, 397 U.S. 358, 381 (1970) (Black, J., dissenting) (connecting due process to natural law theory); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (asserting that right to privacy is best supported by concepts found in natural law). Natural law has been defined as "a set of general moral standards, in contrast to the existing positive law of statutes, codes, and decisions of the legal institutions." David S. Bogen, *The Transportation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 947 (1985).

135. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 986 (1979) (noting that Due Process Clause was most relied-upon clause of Fourteenth Amendment from 1879 to 1937); Viktor Mayer-Schonberger, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 HOW. L.J. 287, 288 (1990) (stating that, following Civil War, liberty right provided foundation for many due process fundamental rights decisions).

136. *See* Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1176 (1991) (stating that substantive due process theory originally protected property interests through Contract Clause and, later, through Due Process Clause); *see also* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 216–17 (1987) (stating first substantive meaning given to due process involved laissez-faire economic theory). The *Dred Scott* decision may be the most notorious example of this use. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450–51 (1856) (holding slaveowners have property interest in slaves and may have slaves returned even after they had escaped to nonslave states).

137. *See* Ribnik v. McBride, 277 U.S. 350, 357 (1928) (invalidating rate regulations for employment agencies), *overruled in part by* Olsen v. Nebraska *ex rel.* Western Reference & Bond Assoc., Inc., 313 U.S. 236 (1941); Adair v. United States, 208 U.S. 161, 172–73 (1908) (finding anti-union contracts violative of Due Process Clause), *overruled in part by* Phelps Dodge Corp. v. National Labor Relations Bd., 313 U.S. 177 (1941); Lochner v. New York, 198 U.S. 45, 52 (1905) (forbidding regulation of bakers' work hours as violative of bakers' right to contract), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

138. *See* Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1192–93 (1991) (claiming that positivist attempts to find historical, cultural, or sociological

At about the same time, the Court in *Meyer v. Nebraska* signaled its willingness to turn its attention to protecting non-economic substantive due process rights.[139] At first, only a few cases followed the *Meyer* holding in identifying and protecting substantive rights under the Fourteenth Amendment.[140] However, in 1965, the Supreme Court in *Griswold v. Connecticut*[141] revived substantive due process by suggesting that the Bill of Rights casts a "penumbra" which contains a right to privacy.[142] Arising from *Griswold* and cases following it is a set of rights surrounding the family, procreation, marriage, and personal autonomy.[143]

Based on rights such as these, courts analyze substantive due process claims under two tiers of review.[144] If the state impinges on any of these fundamental rights or the rights incorporated into the Due Process Clause, the state must then demonstrate under strict scrutiny that it has a compelling interest in the impingement and that its chosen means are necessary to achieve that interest.[145] If, on the other hand, the chal-

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rationale for law attacked theoretical bases of natural law theory); *cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (holding that liberty to contract is subject to restraints of due process, thereby allowing government to regulate employment contracts).

139. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (identifying "liberty" rights of contract, choice of employment, choice of education, marriage, childrearing, religion, and pursuit of happiness); William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 125 (1988) (maintaining that *Meyer* heralded new period of substantive due process protection).

140. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that states must provide counsel in felony cases for some indigent defendants); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (invalidating state law that banned private religious schools because law interfered with upbringing of children).

141. 381 U.S. 479 (1965).

142. *Griswold*, 381 U.S. at 484; *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (locating right to terminate pregnancy within zone of privacy). Some commentators have claimed the penumbra theory has been abandoned in favor of direct reliance on substantive due process as the source of the right to privacy. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994–99 (1979) (asserting later decisions indicate source of right to privacy is Fourteenth Amendment); Viktor Mayer-Schonberger, *Substantive Due Process and Equal Protection in the Fundamental Rights Realm*, 33 How. L.J. 287, 290 n.20 (1990) (claiming Court has abandoned penumbra theory).

143. *See* Zablocki v. Redhail, 434 U.S. 374, 384–86 (1978) (affirming fundamental right to marry); Carey v. Population Servs. Int'l, 431 U.S. 678, 694–95 (1977) (holding due process prohibited ban on sale of nonmedical contraception to minors); *Roe*, 410 U.S. at 152–53 (finding, within right to privacy, fundamental right to terminate pregnancy); *Griswold*, 381 U.S. at 484–85 (finding fundamental right to privacy).

144. *See Griswold*, 381 U.S. at 482 (stating that while Court will not give strict scrutiny to laws involving economic or social issues, it will carefully scrutinize laws that touch on fundamental rights).

145. *See* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 785–86 (1994) (stating strict scrutiny of

lenged act is in an economic or social realm, courts defer to legislative judgment, as long as there is a rational basis for the act.[146]

The fundamental rights protected under the Due Process Clause are closely guarded and the Court has been reluctant to expand these rights beyond their already limited contexts.[147] Language minority plaintiffs should nonetheless evaluate their claims carefully for any implicated rights that might be covered by those currently identified by the Court. In other words, it is at least theoretically possible for a plaintiff to *assert* a new right within a right already *acknowledged* by the Court.[148]

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fundamental rights violations requires that state provide compelling reason for act and show that it has chosen least restrictive means of achieving that purpose); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (applying strict scrutiny to zoning ordinance prohibiting joint tenancy of extended family members); *cf. Roe*, 410 U.S. at 154–56 (acknowledging strict scrutiny standard calls for "compelling interests," but requiring showing of only "important interests" for abortion regulation). Since *Roe*, the Court has developed a more deferential, "middle-tier" standard for state limitations on abortion which requires only that the state not place an "undue burden" on the right. Casey v. Planned Parenthood, 505 U.S. 833, 876–77 (1992). *See generally* Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 (1995) (describing "undue burden" standard).

146. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (stating that Court will not overturn economic or social regulations that it merely finds unwise); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (holding that state law licensing optometrists and opthamologists need merely be rational to be upheld); G. Sidney Buchaman, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1524 (1993) (comparing strict scrutiny given to claims implicating privacy rights with lenient scrutiny given to claims implicating economic rights).

147. *See Bowers*, 478 U.S. at 194 (holding that Constitution provides no right to engage in homosexual acts and asserting that Court must be reluctant to identify new rights without explicit constitutional support); J. Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 13 (1980) (declaring that "the Court's long love affair with substantive due process is past"). *But see* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1027 (1979) (referring to "pretended death" of substantive due process).

148. *Cf.* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (stating, "Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them"); Lawrence H. Tribe & Michael C. Dorb, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (reasoning that "the more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection"). *But cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (dictum) (noting that excessively general language can support undue expansion of rights and advocating that Court recognize new right only when right falls within specific historical traditions); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1035 (1979) (arguing for limited flexibility of Fourteenth Amendment in establishment of new rights).

C. *Affirmative Duties?: Protecting the Rights*

Part of the Court's unwillingness to acknowledge new fundamental rights is its reluctance to require affirmative protection of rights by states.[149] There is a prevailing belief that the rights guaranteed by the Due Process Clause are 'negative rights,' meaning that the state must merely avoid impinging on those rights rather than taking affirmative action to secure them.[150] In *Carmona v. Sheffield*,[151] for example, the United States Court of Appeals for the Ninth Circuit held that sending English-language notice that unemployment benefits will be denied to monolingual Spanish speakers is "reasonable" for procedural due process purposes, because no comparatively easy means existed for sending notification.[152]

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149. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 (1989) (stating that Constitution protects negative rights and does not impose affirmative duties on state). Plaintiffs fare better when merely claiming discrimination rather than making affirmative demands on state. *See* Ramos v. Lamm, 639 F.2d 559, 581 (10th Cir. 1980) (holding that, absent reasonable justification, Colorado prison could not refuse to deliver mail in languages other than English); *cf.* Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 165 (1985) (stating that *Meyer v. Nebraska* invalidated proscription of instruction in foreign language, but created no affirmative right to foreign language instruction).

150. *DeShaney*, 489 U.S. at 201; Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); *see also* Davidson v. Cannon, 474 U.S. 344, 348 (1986) (holding that Due Process Clause makes no affirmative requirement for state prison to protect prisoners from bodily injury caused by other prisoners); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–65 (1986) (stating that Due Process Clause serves as prohibition on impingement of rights, not affirmative mandate to protect them); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409–10 (1990) (reporting common view that Due Process Clause in particular provides only "negative rights"). Many rights, of course, carry with them an affirmative burden. *See DeShaney*, 489 U.S. at 198–99 (listing rights to be affirmatively protected when state has custody of individual, including right to medical care and services to protect health and safety); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2282–83 (1990) (asserting that free speech, protection from unreasonable searches and seizures, and freedom from self-incrimination have all demanded protective affirmative action by government).

151. 475 F.2d 738 (9th Cir. 1973).

152. *Carmona*, 475 F.2d at 739; *see also* Hun Jong Kim v. United States, 822 F. Supp. 107, 112 (E.D.N.Y. 1993) (noting that courts are "loath to find a requirement under due process guarantees that notices to participants in government benefit programs must be written in languages in addition to English"); Vialez v. New York City Hous. Auth., 783 F. Supp. 109, 119 (S.D.N.Y. 1991) (stating due process does not require that notice of tenancy termination be given in Spanish); Guerrero v. Carleson, 512 P.2d 833, 833 (Cal. 1973) (holding due process does not require notice of termination of welfare payments to be given in Spanish), *cert. denied sub nom.* Guerrero v. Swoap, 414 U.S. 1137 (1974); Commonwealth v. Olivo, 337 N.E.2d 904, 908–09 (Mass. 1975) (finding no due process right to eviction notice in Spanish). According to the United States Supreme Court, due process

Nonetheless, had Mr. Flores been successful in asserting a fundamental right, such a result may have placed an affirmative duty on the state to provide him an interpreter at rehabilitation. This is not a novel concept. Indeed, there is precedent for the provision of interpreters in the criminal justice system, although not always as a due process entitlement and not at all stages of the criminal process.[153]

The United States Supreme Court has ruled only once on a constitutional requirement to provide an interpreter. In *Perovich v. United States*,[154] the Court summarily held, without any constitutional analysis, that the decision to provide interpreters should be made solely at the trial court's discretion.[155] While several lower courts later found both Due Process and Confrontation Clause mandates for court interpreters,[156]

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requires that notice be "reasonably calculated" to inform all parties of the pending proceeding and afford the parties an opportunity to respond. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see also* Charles F. Adams, Comment, *"Citado A Comparacer:" Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?*, 61 CAL. L. REV. 1395 *passim* (1973) (arguing right of access to courts mandates notice in recipient's known language); Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 *passim* (1973) (arguing that due process requires notice in known language where economically feasible).

153. Courts have identified four basic sources entitling criminal defendants access to interpreters. First, the Federal Court Interpreters Act provides for the use of interpreters in federal courts for parties and witnesses who do not speak English. 28 U.S.C. § 1827(d)(1) (1994); *see also* FED. R. CRIM. P. 28 (authorizing courts to appoint interpreters of their own selection, either at state's or one or both parties' expense). Second, some state statutes or constitutional provisions ensure access to interpreters. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 21.022–21.023 (Vernon 1996) (providing for interpreters as judge deems necessary). Third, the Due Process Clause guarantees interpreters in some instances. *See* United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (acknowledging due process interest in interpreter), *cert. denied*, 450 U.S. 994 (1981); United States *ex. rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (holding defendant had due process interest in interpreter); *see also* Williamson B.C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CAL. L. REV. 801, 802 (1975) (providing impetus in California courts for right to interpreters at trial). Finally, the Confrontation Clause guarantees indigent criminal defendants access to an interpreter. *See* United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973) (acknowledging right to interpreter under Confrontation Clause when defendant is indigent).

154. 205 U.S. 86 (1907).

155. *Perovich*, 205 U.S. at 91.

156. *See* United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994) (finding right to court interpreter in Fifth Amendment); *Negron*, 434 F.2d at 389 (locating right to interpreter within due process protections); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973) (noting that courts usually rest constitutional right to interpreter on due process or confrontation rights); State v. Faafiti, 513 P.2d 697, 699 (Haw. 1973) (stating due process protects right to interpreter); Garcia v. State, 210 S.W.2d 574, 581 (Tex. Crim. App. 1948) (affirming decision granting constitutional right to interpreter based on right to hear testimony at trial). *But see* State v. Neave, 344 N.W.2d 181, 184 (Wis. 1984) (holding that, as matter of "judicial administration," defendant is entitled to

these mandates are not absolute and may be limited by the courts' findings that the language difficulty is not serious.[157] In addition, trial translation need not be continuous,[158] and the right to an interpreter can be waived if not requested.[159] While Congress has supplemented the constitutional protections with the Federal Court Interpreters Act,[160] the courts have limited this statute in many of the same ways that they have limited

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interpreter, but explicitly refusing to identify federal constitutional right). In most jurisdictions, there is no right to an interpreter at state expense where the defendant is not found to be indigent. *See* United States v. Desist, 384 F.2d 889, 901–03 (2d Cir. 1967) (holding that where defendant can afford his or her own interpreter, it is not reversible error to fail to appoint one), *aff'd*, 394 U.S. 244 (1969). *But see* Joan B. Safford, *No Comprendo: The Non-English-Speaking Defendant and the Criminal Process*, 68 J. CRIM. L. & CRIMINOLOGY 15, 27 (1977) (observing that in Fifth and Ninth Circuits and Puerto Rico, interpreters are available whether or not defendant is indigent). Defendants may also be required to share interpreters. *See* Chavira Gonzales v. United States, 314 F.2d 750, 752 (9th Cir. 1963) (rejecting assertion that defendant who shared interpreter with another defendant was "unduly hampered" by not having own interpreter).

157. *See* United States v. Rodriguez, 424 F.2d 205, 206 (4th Cir. 1970) (holding that interpreter was not necessary in defendant's second trial after defendant admitted that he understood everything in his first trial); Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962) (finding that interpreter was not needed for Cuban defendant who had sufficient command of English language); Pietrzak v. United States, 188 F.2d 418, 420 (5th Cir. 1951) (determining that lower court did not abuse its discretion in refusing interpreter); *see also* United States v. Sanchez, 928 F.2d 1450, 1456 (6th Cir. 1991) (stating that "'[a]s a constitutional matter, the appointment of interpreters is within the district court's discretion'") (quoting United States v. Bennett, 848 F.2d 1134, 1141 (11th Cir. 1988)).

158. *See* United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990) (stating that "occasional lapses" in interpretation do not violate constitutional protection); Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989) (finding summary translation adequate, especially when defendant did not object); People v. Rodriguez, 728 P.2d 202, 208 (Cal. 1986) (holding no reversible error where material interruption in translation is not shown to be harmful); Connecticut v. Munoz, 659 A.2d 683, 697 (Conn. 1995) (stating that, under facts of case, defendant who had limited understanding of English and who was represented by same attorney at probable cause hearing and trial is not entitled to separate, continuous translation at probable cause hearing); *see also* Chavez v. Indiana, 534 N.E.2d 731, 736 (Ind. 1989) (ruling that simultaneous translation is not required at joinder hearing for non-English speaking defendant). *But see Carrion*, 488 F.2d at 14 (implying that constitutional right to interpreter may exist even where defendant can speak some English).

159. *See* United States v. Huang, 960 F.2d 1128, 1135 (2d Cir. 1992) (holding that objections to provision of non-certified interpreter can be waived); United States v. Yee Soon Shin, 953 F.2d 559, 561 (9th Cir. 1992) (holding defendant waived right to interpreter by not objecting); *Joshi*, 896 F.2d at 1309 (stating defendant waived objection to lapses in continuous interpretation by failing to object).

160. *See* 28 U.S.C. § 1827 (1994) (providing for use of interpreters in federal trials at court's discretion). This statute creates a federal program providing for the use of certified interpreters and leaves it to judicial discretion to determine when a party or witness "speaks only or primarily a language other than the English language." *Id.* § 1827(d)(1)(a). Texas provides for the granting of an interpreter on the motion of any party or of the court, when it is determined that the defendant or a witness cannot speak

constitutional rulings mandating protections.[161] Outside this limited and somewhat unreliable provision for interpreters at "critical phases"[162] of court proceedings, language minority defendants are generally not entitled to interpreters.[163]

V. THE *FLORES* DECISION

Clearly, the Fourteenth Amendment deck was stacked against Mr. Flores as he asserted his claims in the Texas Court of Criminal Appeals. Because he could assert no claim to an already acknowledged fundamental right, he faced the nearly insurmountable obstacle of court unwillingness to extend due process protections. Further, in order to successfully assert an equal protection claim, he could be required to establish a nexus between discrimination based on his language and discrimination against his race.

Believing that such a nexus existed in his case, Mr. Flores asserted that the lower court's refusal to provide rehabilitative services in Spanish had a disproportionate adverse effect on Latinos, a suspect classification for equal protection purposes.[164] However, the plurality held that Mr. Flores's inability to speak English did not place him within a classification

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and understand English. TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon 1979 & Supp. 1996). There is no indigency requirement. *Id.*

161. *See Valladares*, 871 F.2d at 1565–66 (stating that Court Interpreters Act places duty on courts to ask about need for interpreter, but that interpretation need not be continuous). According to *Valladares*, the ultimate question to be asked is "whether any inadequacy in the interpretation 'made the trial fundamentally unfair.'" *Id.* at 1566 (quoting United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980)); *see also Sanchez*, 928 F.2d at 1455 (finding it permissible for multiple defendants to share interpreter if each has time to confer with counsel); *cf. Joshi*, 896 F.2d at 1309 (stating Court Interpreters Act does not create constitutional rights).

162. *See* 28 U.S.C. § 1827(d)(1), (j) (1994) (setting parameters of protection to include pretrial, trial, and grand jury proceedings).

163. *See* Quiroz v. Wawrzaszek, 749 F.2d 1375, 1377 (9th Cir. 1984) (finding no ineffective assistance of counsel where defense attorneys communicated potential sentence ranges to non-English-speaking defendant through combination of sign language, English, and drawings), *cert. denied*, 471 U.S. 1055 (1985), *overruled on other grounds by* Adams v. Peterson, 968 F.2d 835, 841 (9th Cir. 1992); Rivera v. Granucci, No. N–87-480 (JAC), 1993 U.S. Dist. LEXIS 3264, at *17–18 (D. Conn. Mar. 13, 1993) (holding due process does not require interpreter at arrest even where local ethnic concentration is high, although failure to give *Miranda* warnings so that suspect understands them may render any statement inadmissible). *But see* KAN. STAT. ANN. § 75–4351 (1984) (providing for interpreters prior to interrogation for persons whose primary language is not English).

164. Flores v. State, 904 S.W.2d 129, 131 (Tex. Crim. App. 1995) (en banc), *cert. denied*, 116 S. Ct. 716 (1996). The Supreme Court previously found that Latinos warranted suspect classification status for equal protection purposes. Hernandez v. Texas, 347 U.S. 475, 479–80 (1954).

based on race or national origin.[165] The court noted that language ability was not an immutable characteristic that merited a suspect classification and, thus, the court's most searching review.[166] Also, the court found no nexus between race and language because general classifications based on language do not involve discrimination against a *particular* race, and, therefore, have no nexus with race or national origin.[167] Additionally, the court noted that where an otherwise neutral law is claimed to have a disproportionate impact on a suspect class, the Supreme Court and Texas courts have required that the plaintiff show a discriminatory purpose behind the action.[168]

In addition to rejecting Flores's equal protection challenge, the court rejected his contention that the lower court had violated his due process rights by denying him probation.[169] The *Flores* court held that probation did not qualify as a fundamental right because it is given solely at the discretion of the trial court and is, therefore, not included among the rights protected by the Fourteenth Amendment's Equal Protection and Due Process clauses, or by any parallel provisions in the Texas Constitution.[170]

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165. *See Flores*, 904 S.W.2d at 130 (stating that language does not warrant suspect classification because it is not same as race or national origin).

166. *Flores*, 904 S.W.2d at 130. When a state actor discriminates against a suspect group, the justification for the act or legislation must be compelling, and the action must be narrowly tailored to meet the stated need. Plyler v. Doe, 457 U.S. 202, 216–17 (1982); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Korematsu v. United States, 323 U.S. 214, 216 (1944); *see* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly and Otherwise*, 64 TEMP L. REV. 937, 938 (1991) (claiming that courts apply strict scrutiny to suspect classifications to compensate for inadequate access to political process).

167. *Flores*, 904 S.W.2d at 130–31.

168. *Flores*, 904 S.W.2d at 130; *see also Feeney*, 442 U.S. at 274 (noting discrimination is unlawful under equal protection analysis only if purposeful); Washington v. Davis, 426 U.S. 229, 242 (1976) (stating disproportionate impact alone does not invalidate facially neutral act). *But see* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 763 & n.8 (calling some traits, such as language or pregnancy, "super-correlated" to suspect or quasi-suspect classes and arguing that these traits may deserve special scrutiny, even without showing of discriminatory intent).

169. *Flores*, 904 S.W.2d at 130.

170. *Flores*, 904 S.W.2d at 130. In addition, the court found no protection for language rights in the Texas Equal Rights Amendment, noting only that Mr. Flores presented no evidence to support his claim that the amendment provides greater protection to minorities than either the federal constitution or other state constitutional provisions. *Flores*, 904 S.W.2d at 130–31. The court noted that Mr. Flores provided no evidence that the framers of the amendment intended such a reading. *Id. But see id.* at 132 (Clinton, J., dissenting) (observing that Texas Equal Rights Amendment is "self-operative"); José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right of Gov-*

Finding no suspect classification or fundamental right at issue, the Court of Criminal Appeals applied a minimal standard of review and held that refusing to consider Mr. Flores for probation was rationally related to the trial court's stated goal of ensuring meaningful rehabilitation.[171] In so holding, the court invoked a "parade of horribles," stating that an opposite holding would require states to set up rehabilitation programs in "many different" languages or to provide probationers with probation officers who speak their language.[172]

Judge Meyers, concurring, noted that while language did not "raise a presumption" of discrimination based on race, a showing that such discrimination merely served as a pretext for racial animus would result in a reversal of the conviction.[173] Judge White also concurred, but did not publish an opinion.[174] Judge Clinton, dissenting, wrote that the Texas equal protection provision[175] protects individuals against discrimination

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ernment in a "Known Tongue," 13 LAW & INEQ. J. 443, 626 (1995) (arguing that Texas Equal Rights Amendment provides strong basis for expanding protections beyond those of federal Constitution). Although beyond the scope of this Comment, an argument that the Texas history and constitution provide broad protections for language minorities is a solid one. For an exhaustive study, *see* José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue,"* 13 LAW & INEQ. J. 443 (1995). Of course, a state constitution may provide more protection than the federal Constitution. *See* Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (expanding Article I, § 9 protections of Texas Constitution beyond Fourth Amendment protections of U.S. Constitution); Johnson v. State, 864 S.W.2d 708, 720–23 (Tex. App.—Dallas 1993) (noting that state constitution is separate from and not dependent upon federal Constitution, but nonetheless adopting federal definition of "seizure"), *aff'd*, 912 S.W.2d 227 (Tex. Crim. App. 1995); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (observing that "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law"); Erica B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66 (1974) (noting that states could, under their own constitutions, offer broader guarantees of bilingual education than federal government). Texas courts determine whether there should be expanded protections by evaluating the intent of the state constitution's framers and voters keeping in mind the goals the relevant constitutional provision is designed to accomplish. James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY'S L.J. 399, 411 (1993).

171. *Flores*, 904 S.W.2d at 130–31.

172. *Id.* at 131. The court concluded that such an imposition should come from the legislative branch rather than the judicial branch. *Id.*

173. *Flores*, 904 S.W.2d at 131 (Meyers, J., concurring). Judge Meyers suggested that if the record showed that the trial judge routinely denied probation to Latinos who could speak English, then he would reverse the conviction based on racial discrimination grounds. *Id.*

174. *Id.* (White, J., concurring).

175. TEX. CONST. art. I, § 3a.

based on national origin and that this protection is broad enough to encompass ethnic traits such as language.[176]

Judge Overstreet, joined by Judges Baird and Maloney,[177] wrote a lengthy dissent in which he carefully analyzed each of Mr. Flores's claims and their legal bases.[178] In concluding that Mr. Flores had been denied a fundamental right under the Due Process Clause, Judge Overstreet noted that Texas has acknowledged a convicted individual's right to consideration of the entire array of punishments available.[179] According to Judge Overstreet, a refusal to consider that array on the basis of language amounted to a due process deprivation.[180] In addition, Judge Overstreet wrote that language is a characteristic that may identify a person as a member of a suspect group.[181] Judge Overstreet found that the trial judge had denied Mr. Flores probation in part because of Mr. Flores's cultural heritage.[182] Thus, in Judge Overstreet's opinion, the decision to deny Mr. Flores probation merited strict scrutiny.[183] Furthermore, the decision could not survive strict scrutiny because other options were available to the trial court to meet its stated goal of effective rehabilitation.[184] For example, the trial court could have sent Mr. Flores to the Spanish-language rehabilitation provided by the State of Texas, or the court could have appointed an interpreter for rehabilitation, as it had at trial.[185]

Judge Overstreet's arguments did not prevail. Instead, the court held that, absent an implicated fundamental right or suspect classification, neither the county nor the trial court was obligated to provide rehabilitation services in Spanish.[186] However, this conclusion was not inevitable; the Supreme Court has never held that the Constitution *forbids* interpreters.[187] Indeed, none of the plurality's conclusions based on the Four-

176. *Flores*, 904 S.W.2d at 132 (Clinton, J., dissenting).

177. Judge Maloney joined the dissent but noted that, under the facts presented in *Flores*, language had served as a surrogate for race. *Flores*, 904 S.W.2d at 139 (Maloney, J., dissenting).

178. *See id.* at 132–39 (Overstreet, J., dissenting) (providing detailed analysis of Fourteenth Amendment claims). In sharp contrast, the plurality opinion resolved all the Fourteenth Amendment issues in three paragraphs. *Id.* at 130–31.

179. *Flores*, 904 S.W.2d at 135 (Overstreet, J., dissenting).

180. *Id.*

181. *Id.* at 137.

182. *Id.*

183. *Flores*, 904 S.W.2d at 137 (Overstreet, J., dissenting).

184. *Id.* at 138.

185. *Id.*

186. *Id.* at 131.

187. *See* Perovich v. United States, 205 U.S. 86, 91 (1907) (stating that appointment of court interpreters is discretionary).

teenth Amendment were inevitable.[188] They can only be justified by a mechanical application of Fourteenth Amendment principles.[189]

VI. An Argument for a Less Formalistic Reading of the Fourteenth Amendment

A. *Equal Protection: Remembering What Makes a Group Suspect*

A mechanical, formalistic approach to Fourteenth Amendment interpretation is exemplified by equal protection cases involving language-minority claims. In these cases, courts have required language minorities to invoke the talismans of race and national origin at an impossible level of specificity in order to succeed.[190] However, requiring language-minority plaintiffs to show that language-based discrimination is a pretext for discrimination based on race or national origin misses the point.[191] This nexus requirement allows states to discriminate on a *defining* characteris-

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188. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 212–13 (1989) (Blackmun, J., dissenting) (stating that Fourteenth Amendment decisions are not inevitable, because precedent may be viewed from broad or narrow perspective, as one chooses).

189. *Cf.* Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (disposing summarily of language discrimination claim by stating that "[w]e are not dealing here with a suspect nationality or race"); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (deciding, within one-page decision, that California's decision to deal only in English was reasonable and not violative of Fourteenth Amendment). These two examples demonstrate a mechanical application of Fourteenth Amendment principles.

190. *See, e.g.,* Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (finding language-based discrimination improper only because discrimination was against *specific* languages and thus could be seen as directed at race or national origin), *vacated as moot*, 484 U.S. 806 (1987); Smothers v. Benitez, 806 F. Supp. 299, 306 (D.P.R. 1992) (stating language discrimination merits heightened scrutiny where it is directed at particular race or national origin group, but suggesting quasi-suspect classification in other cases); Pabon v. McIntosh, 546 F. Supp. 1328, 1340 (E.D. Pa. 1982) (finding general language discrimination is not race-based); *see also* Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. Rev. 481, 490 (1994) (arguing that language discrimination should only be given heightened scrutiny if state actions "mandate special treatment for *particular* language groups").

191. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885, 901 (1986) (advocating abandonment of national origin "pigeonhole" and replacing it with protection of right to view world through individual cultures and not to be refused fundamental right based on language ability). Piatt's suggestion involves three proposals. *Id.* at 902. First, where an individual, because of language barrier, is denied the exercise of a fundamental right or access to a basic human need, society would allow "limited official bilingualism." *Id.* Second, where circumstances require communication in one language, such as when safety is at risk, society would recognize "limited official monolingualism." *Id.* Third, in all other areas, courts would protect the right to use one's language of choice. *Id.*

tic of race or national origin without a compelling justification.[192] While language does not equal race or national origin, it is a subset of these classifications.[193] Language is a reflection of origin,[194] an index of otherness,[195] and can, by itself, serve as a locus of oppression.[196] Further, no problem associated with belonging to a minority is not shared by a minority who cannot speak English. In fact, these individuals, isolated from the political, social, and commercial life of the English-speaking majority, are arguably more insulated, more oppressed, and less able to find political representation than their English-speaking counterparts.[197] When these individuals fail to prove that language discrimination serves as a pretext for racial or national origin discrimination, courts find themselves in the

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192. *Cf.* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 763–64 & n.8 (arguing that language is "super-correlated" to race); Recent Case, *Peremptory Challenges—Third Circuit Holds That Peremptory Challenges Based on Foreign Language Ability Do Not Violate the Equal Protection Clause*, 108 HARV. L. REV. 769, 772 n.34 (1995) (analogizing logic of allowing discrimination on basis of language to allowing discrimination based on skin color).

193. *See supra* notes 70–72 and accompanying text. *But see Pabon*, 546 F. Supp. at 1340 (finding no suspect classification implicated in prisoner's claim that prison violated Fourteenth Amendment by not providing classes in Spanish, because failure to provide classes affected anyone who did not speak English, regardless of national origin); Flores v. State, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995) (en banc) (stating that Spanish-speaking persons have various nations of origin and should not be treated as single group), *cert. denied*, 116 S. Ct. 716 (1996).

194. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 896 (1986) (stating that language and culture are "inseparably interrelated").

195. *See* Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 159 (1985) (noting history of prejudice against all people viewed by dominant group as "different").

196. *See* Hernandez v. New York, 500 U.S. 352, 371 (1991) (noting that "language elicits a response from others" that can range from respect to scorn); *Flores*, 904 S.W.2d at 132 n.1 (Overstreet, J., dissenting) (stating that inappropriate discrimination in *Flores* case was based on fact that Mr. Flores did not speak English, not on any particular national origin); *see also* DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 1 (1990) (stating that non-English speakers may be regarded by some as not only un-American, but "sub-human"). As an example of blind linguistic prejudice, in 1904 a railroad president said of some of his workers, "These workers don't suffer—they don't even speak English." Daniel Shanahan, *We Need a Nationwide Effort to Encourage, Enhance, and Expand our Students' Proficiency in Language*, CHRON. OF HIGHER ED., May 31, 1989, at A40.

197. *See Benitez*, 806 F. Supp. at 305 (stating that language minorities are "vulnerable to majoritarian politics"); *cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472–73 n.24 (1985) (Marshall, J., dissenting) (asserting that insularity can mean "social and cultural" isolation as well as political isolation).

odd position of tacitly approving even unnecessary and wasteful discrimination against a historically oppressed ethnic minority.[198]

However, such tacit approval may not be necessary where the presence of high concentrations of language minorities would seem to demand accommodation.[199] That Mr. Flores lived in Texas, where one-quarter of the population is Latino,[200] should be relevant to his equal protection claim. In *Hernandez*, the Supreme Court made it clear that courts can consider the demographic context of language discrimination in determining whether to apply strict scrutiny.[201] In an area with relatively high proportions of individuals who speak a particular minority language, states should be expected to provide services in that language.[202] Further, if plaintiffs can demonstrate historical discrimination against the implicated minority, courts should afford the most careful scrutiny to their claims.[203] On the other hand, if a language minority plaintiff spoke a more exotic and rare language, and that language minority did not have a history of discrimination in that state, a sentencing court may argue that, after exhausting all reasonable means of procuring an interpreter, it was

198. *See* Asian Am. Bus. Group v. City of Pomona, 716 F. Supp. 1328, 1332 (C.D. Cal. 1989) (stating that facial language discrimination necessarily establishes national origin discrimination because otherwise, state actors could avoid strict scrutiny by merely passing acts that discriminate on basis of language rather than race or national origin).

199. *See Hernandez*, 500 U.S. at 371 (stating that size of minority group in community may bear on whether discrimination based on that minority's language is unconstitutional); Yu Cong Eng v. Trinidad, 271 U.S. 500, 511–12 (1926) (finding size of Chinese community in Philippines important factor in its discrimination analysis); *Flores*, 904 S.W.2d at 137 (Overstreet, J., dissenting) (relying on *Hernandez* discussion of relevance of demography to language-minority's constitutional claim to argue that Mr. Flores's equal protection rights were violated).

200. Ronald Brownstein, *Two States of Progress for Latinos: For Minorities in Politics, Texas and California Are Worlds Apart; Demographic Patterns Are Part of the Explanation*, L.A. TIMES, Aug. 1, 1990, at A1. Thirty-seven of the 254 counties in Texas have more than 2,000 people who speak only Spanish. Sylvia Moreno, *PUC to Propose Bilingual Mandate for Many Utilities*, DALLAS MORNING NEWS, Nov. 21, 1994, at A11.

201. *See Hernandez*, 500 U.S. at 371 (stating that in some communities with concentrations of ethnic residents, language discrimination should be seen as pretext for race discrimination).

202. *See* Guerrero v. Carleson, 512 P.2d 833, 842 (Cal. 1973) (Tobriner, J., dissenting) (arguing that providing notice in language represented by large percentages of population would not necessarily mean having to provide notice in rare languages), *cert. denied sub nom.* Guerrero v. Swoap, 414 U.S. 1137 (1974).

203. *See* Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) (naming groups that are likely to reflect prejudice as deserving of strict scrutiny for equal protection); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (listing susceptibility to prejudice as factor in determining whether group classification merits strict scrutiny); *see also* Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 939 (1991) (stating whether or not group has suffered historical discrimination is relevant in determining if it will be classified as suspect).

unable to do so.[204] Thus, the recognition of a significant language minority as a suspect class should still permit unavoidable or necessary discrimination.

Because language is so intimate a reflection of origin,[205] recognition of language as a suspect classification is warranted.[206] When a state wishes to discriminate against a language minority, it should be required to put forth a compelling reason for such discrimination.[207] Further, the state

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204. *See Guerrero*, 512 P.2d at 842–43 (Tobriner, J., dissenting) (asserting that providing notice to California's Spanish-speaking residents would not obligate state to provide notice in exotic languages such as Basque or Chippewa, because such obligation would be unreasonable when so few residents speak those languages); *see also Flores*, 904 S.W.2d at 138 (Overstreet, J. dissenting) (noting that interpreter had been provided to Mr. Flores at trial and could have been provided for rehabilitation). However, in the absence of an interpreter, the most appropriate remedy for Mr. Flores on a successful appeal might have been probation without rehabilitation. *See Flores*, 904 S.W.2d at 139 n.5 (Overstreet, J., dissenting) (stating that, although there is no right to probation, appropriate remedy for discriminatory denial might have been probated sentence).

205. *See Hernandez*, 500 U.S. at 364 (referring to language as means of defining self); *Asian Am. Bus. Group*, 716 F. Supp. at 1330 (stating that language flows from national origin); *Flores*, 904 S.W.2d at 136 (Overstreet, J., dissenting) (calling language "but one characteristic that may distinguish a person as a member of a suspect class"); Recent Case, *Peremptory Challenges—Third Circuit Holds That Peremptory Challenges Based on Foreign Language Ability Do Not Violate the Equal Protection Clause*, 108 HARV. L. REV. 769, 772 (1995) (calling language ability "an integral manifestation of ethnicity").

206. *See* Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1354 (1987) (arguing that language minorities possess nearly all indicia of suspectness, but suggesting they be classified as "quasi-suspect"). Mutability is often the most contested trait. *See Flores*, 904 S.W.2d at 130 (Overstreet, J., dissenting) (claiming that people can choose freely what language they will speak); Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1354–55 (1987) (noting difficulty in analyzing mutability). However, statements that language handicaps are easy or even possible to overcome for adults have been controverted. *See Benitez*, 806 F. Supp. at 306 (stating that some aspects of language are immutable: even after English is learned, accents, surnames and patterns of behavior remain); *Flores*, 904 S.W.2d at 136 (Overstreet, J., dissenting) (stating that for monolingual non-English speakers, language may be immutable trait); *cf.* Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 203 (1985) (stating that equality principle which ignores relevant differences wrongly obscures society's responsibility to "relate across differences"); Williamson B.C. Chang & Manuel U. Araujo, Comment, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CAL. L. REV. 801, 805 (1975) (arguing that even when victims of discrimination can remedy "offensive" trait, state must bear responsibility for discrimination).

207. *See supra* note 192 and accompanying text. *But cf.* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 969–70 (1988) (arguing that government interests are as subjectively defined as fundamental rights and therefore are as difficult to identify). Certainly, public safety would be a valid purpose, where legitimately implicated. *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (stating that government's interest in safety can

should be required to demonstrate that it had considered alternatives to the discriminatory act.[208] In states where language minorities make up significant percentages of the population, and historical discrimination against those minorities is present, the state should carry the heavy burden of demonstrating that it took the only action necessary to achieve an urgent purpose.[209]

B. *Fundamental Rights: Knowing Them When We See Them*

Current due process analysis is of no more help to language minorities than the mechanically applied Equal Protection Clause.[210] In protesting a state action under the Due Process Clause, language minorities must first locate their putative rights within a guarded set of due process fundamental rights.[211] In Mr. Flores's case, two potential liberty rights are most at stake: 1) his right to fair criminal proceedings[212] and 2) his right to choose, with impunity, the language he will speak.[213]

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outweigh individual's interest in liberty); *see also* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 902 (1986) (claiming that safety may be compelling reason for "limited official monolingualism" in some cases).

208. *See Flores*, 904 S.W.2d at 138 (Overstreet, J., dissenting) (noting alternatives available to sentencing court in *Flores*: state program with Spanish interpreters, county provision for interpreters, and use of trial interpreter at rehabilitation); *see also* Thongvanh v. Thalacker, 17 F.3d 256, 259 (8th Cir. 1994) (finding prison policy of refusing mail in Lao language violated equal protection because reasonable alternatives were available to ensure prison security); Recent Case, *Peremptory Challenges—Third Circuit Holds That Peremptory Challenges Based on Foreign Language Ability Do Not Violate the Equal Protection Clause*, 108 HARV. L. REV. 769, 773–74 (1995) (arguing that availability of less discriminatory alternatives to language-based juror discrimination should invalidate exclusion of language minorities).

209. *See Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (stating that Court must be especially vigilant when it reviews discrimination involving groups who have been historically disadvantaged).

210. *See* Reno v. Flores, 113 S. Ct. 1439, 1447 (1993) (stating that Court should exercise judicial restraint in identifying new due process rights); Hodge v. Jones, 31 F.3d 157, 167 (4th Cir. 1994) (relying on Supreme Court's unwillingness to identify new substantive due process rights to reject claim that maintaining unsubstantiated child abuse investigative reports violates due process), *cert. denied*, 115 S. Ct. 581 (1994); Gray v. Romeo, 697 F. Supp. 580, 584 (D.R.I. 1988) (noting Supreme Court's reluctance to identify new privacy rights).

211. *See* Greenholtz v. Inmates of Neb. Penal & Correction Complex, 442 U.S. 1, 7 (1979) (noting that initial question in due process claim is nature of asserted interest); *see also* Vitek v. Jones, 445 U.S. 480, 487 (1980) (stating that threshold issue of due process claim by mental hospital prisoner was whether liberty interest was at stake).

212. *See* Bearden v. Georgia, 461 U.S. 660, 670 (1983) (finding state could not revoke probation on basis of indigency alone); United States *ex. rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (finding constitutional right to interpreter during trial).

213. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885 *passim* (1986) (advocating constitutional protection for choice of lan-

The latter right may be the most difficult for language minorities to assert. While the claim of a protected right to monolingualism may be attractive, no court has addressed it.[214] The Supreme Court came closest to recognizing rights based on language choice in *Meyer v. Nebraska*,[215] but however promising that decision appeared to be, it is nonetheless a decision that arguably based its holding on the right to choose an occupation and one's child's education.[216] In addition, given its hesitancy to identify any new rights at all, the Court is unlikely to expand fundamental rights to include monolingualism.[217]

However, identifying a right to one's language and culture does not seem unreasonable.[218] Such a right might be included in the right to freedom of speech guaranteed by the First Amendment or any other relevant protection provided by the Bill of Rights and incorporated against the

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guage); *cf.* Bowers v. Hardwick, 478 U.S. 186, 203–04 (1986) (Blackmun, J., dissenting) (stating that Court has recognized privacy interest for decisions that should be left to individuals to make).

214. *See* Hiram Puig-Lugo, *Freedom to Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO-LATINO L. REV. 35, 41 (1991) (stating that there is no right to speak one's choice of language in United States). *But see* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 885–86 (1986) (arguing that *Meyer*, *Yu Cong Eng*, and other cases support existence of right to language choice).

215. 262 U.S. 390 (1923).

216. *Meyer*, 262 U.S. at 403. *But see* William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 185–86 (1988) (arguing that *Meyer* impliedly expanded personal liberty and substantive due process rights).

217. *See* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (dictum) (implying that Court should be reluctant to identify new fundamental rights); *Bowers*, 478 U.S. at 194 (stating that Court was not inclined to identify new fundamental rights in Due Process Clause without explicit constitutional authority).

218. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 891–92 (1986) (supporting right to language, but noting it has not been acknowledged in workplace, civil proceedings, notice of termination, or notice of reduction of services or benefits); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247, 250 (1990) (stating, "[i]t is frightening to think that because something is a discretionary benefit in the first place, its denial on *any* grounds or in *any* circumstance has no constitutional significance"); Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 736 (1995) (positing that Constitution permits language minorities to participate in public life and maintain ties to culture). *But see* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040–42 (1979) (arguing new rights should be acknowledged only if American institutions have historically recognized claim as highly important and contemporary society values liberty). The flaw in this approach, of course, is that a liberty interest with institutional and popular support is probably amply protected, while a liberty interest attributed to a group that has been traditionally discriminated against might garner little popular support.

states through the Fourteenth Amendment,[219] or it might be identified as a liberty or privacy interest under substantive due process analysis.[220] In *Bowers v. Hardwick*,[221] the Supreme Court stated that substantive due process rights are either explicit or implicit in the Constitution and are supported by an arguably specific level of tradition.[222] Certainly implicit in the Constitution's wide array of guaranteed freedoms is the right to choose or maintain one's identity.[223] This right is reflected in the First Amendment guarantees of the free exercise of religion and speech, as well as the right of free association.[224] Language tolerance and protection is supported by a long tradition of coexistence between diverse cultures and their attendant traits.[225] This tradition, and the implicit right to choose one's identity, support an argument that language should be a protected right. Further, the creation of this protected right should place upon states an affirmative duty to accommodate monolingual language minorities through the provision of interpreters and meaningful notice of the denial of state services.[226]

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219. *See supra* note 121 and accompanying text.

220. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885 *passim* (1986) (arguing for constitutional right to language).

221. 478 U.S. 186 (1986).

222. *Bowers*, 478 U.S. at 191–92.

223. *Cf. id.* at 203–04 (stating that Court has recognized privacy interests where decisions belonging to individuals are implicated).

224. *See* Bill O. Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 880–81 (1993) (arguing that promoting one's ethnicity is consistent with constitutional principles).

225. *See* Dennis Baron, *Federal English* (noting official tolerance of other languages in early United States history), *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 36, 37 (James Crawford ed., 1992); Shirley B. Heath, *Why No Official Tongue?* (stating use of languages other than English was encouraged in early United States), *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 20, 22 (James Crawford ed., 1992).

226. *Cf.* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 438 (1990) (noting agreement among diverse commentators that Fourteenth Amendment is powerful source of affirmative duties); Bill Piatt, *Toward Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 902 (1986) (stating where important benefits or services are at stake, society should acknowledge "official bilingualism"); Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 *passim* (1973) (maintaining that notice in known language should be available whenever feasible). State inaction is, of course, a sort of action, with its own significance and results. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (complaining that Court decisions draw artificial line between action and inaction); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2280 (1990) (arguing distinction between action and inaction cannot justify current view of Constitution as protecting only negative liberties). *But see* Harris v. McRae, 448 U.S. 297, 317–18 (1980) (stating that liberty interest

However, an expansion of current substantive due process rights to include protection for language is not likely to occur under the present Supreme Court.[227] Thus, an argument in support of a fundamental right to a fair outcome in criminal proceedings, the second potential right implicated in *Flores*, may be somewhat more reliable. This approach may provide an indirect way for language minorities to prevail, as courts are less likely to balk at finding other already-identified rights implicated in a language minority's claim.[228] The *Flores* court might have found that this right to fair criminal proceedings includes a right to meaningful rehabilitation, or, alternatively, a right to probation.

There is, however, an obstacle to finding such a right, as the *Flores* plurality noted.[229] Language minorities claiming that they have been denied a right must make a valid assertion that such a right exists, and that they are not merely laying claim to a privilege.[230] Although sharply criticized,[231] the distinction between rights, which are protected by the Constitution, and privileges, which are seen as mere "acts of grace," is deeply

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protects individuals from interference with freedom of choice but does not grant entitlement to funds to pay for every choice).

227. *See Michael H.*, 491 U.S. at 127–28 n.6 (dictum) (arguing that Court should be reluctant to identify new fundamental rights).

228. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995) (striking official English amendment on First Amendment grounds), *cert. granted*, 116 S. Ct. 1316 (1996); *Negron*, 434 F.2d at 389 (finding right to interpreter under Confrontation Clause); Gomez v. Myers, 627 F. Supp. 183, 188–89 (E.D. Tex. 1985) (ruling that court must accept prisoners' civil rights claim in Spanish, on basis of fundamental right of access to courts).

229. *See* Flores v. State, 904 S.W.2d 129, 130 (Tex. Crim. App. 1995) (en banc) (arguing that probation is privilege granted at state's discretion, not state-created or constitutional right), *cert. denied*, 116 S. Ct. 716 (1996); *see also* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 431 (1990) (arguing that nature of state's duty turns on "fundamental right at stake").

230. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 463 (1981) (holding that before individual can claim due process protection, fundamental right, either constitutional or state-created, must exist).

231. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278–79 (1990) (calling action/inaction rights distinction "unworkable and misguided" because it reduces government duties to simple "either/or" questions); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1310–11 (1984) (arguing that right/privilege distinction is logically flawed because idea that government may conditionally deny benefit does not logically flow from idea that it may absolutely deny benefit); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1443–45 (1967) (noting harsh consequences of doctrine, which include loss of job or profession or exclusion from educational opportunities). *But cf.* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (asserting that distinction between positive and negative rights is correct, but requires principled application).

entrenched in constitutional law.[232] The rationale for the distinction is painfully logical: if the government has no duty to provide a service or benefit, then it may use its limited discretion to deny or allocate it.[233]

Of course, a state may not deny or condition even a privilege for an unconstitutional reason.[234] For example, in *Bearden v. Georgia*,[235] the United States Supreme Court stated that probation may not be revoked for failure to pay a fine simply because a probationer is indigent.[236] Unfortunately for Mr. Flores, the *Bearden* Court explicitly noted that considerations such as indigency may be taken into account *before probation is*

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232. *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (stating that "[t]he Petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"); *see also* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 190 (1967) (defining "act of grace doctrine" as denying ability of Constitution to limit government's granting of privileges). *But see* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1461–62 (1968) (arguing distinction has lost vitality because of increased government involvement in private lives).

233. *See Harris*, 448 U.S. at 315–18 (holding that right to abortion placed no duty on government to fund medically necessary procedures). This idea is based on the premise of "greater and lesser," which holds that the government may precondition that which it may deny entirely. Of course, it is not altogether clear that a state *could* deny probation. *Cf.* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1313 (1984) (calling doctrine of greater and lesser "flawed" because it is unclear that government could withhold privileges).

234. Graham v. Richardson, 403 U.S. 365, 374 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Speiser v. Randall, 357 U.S. 513, 518 (1958); *see* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2274–75 (1990) (noting assumption that governments may not deny services on unconstitutional premises); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 190 (1967) (observing that "privilege" theory has been replaced with theory of "unconstitutional conditions"). For example, it is unassailably true that should a government deny a service or benefit on an unconstitutional premise—race, for example—the individuals affected would have a valid constitutional claim (in the case of race, an equal protection claim). *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989) (defining unconstitutional conditions as notion that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether"). *But see Harris*, 448 U.S. at 315–17 (upholding Hyde Amendment, which denied state-funded abortions for indigent women).

235. 461 U.S. 660 (1983).

236. *See id.* at 670–72 (holding that without judicial findings, probationer was responsible for failure to pay fine and that because no adequate alternatives for punishment were available, state cannot revoke probation for failure to pay fine); *see also* Tate v. Short, 401 U.S. 395, 397–401 (1971) (stating that where statute only authorized fine, state could not imprison indigent defendant for inability to pay); Williams v. Illinois, 399 U.S. 235, 239–40 (1970) (holding state may not imprison offender beyond time allowed by statute to make him "work off" fine).

granted,[237] thus affirming the premise that there is no protected interest in the granting of probation. In addition, Mr. Flores was required to establish that the denial of a government benefit—probation—on the basis of *language* is unconstitutional.[238] If he were denied probation on the basis of the exercise of his free speech or his religion, or because of his race, the matter would be simple—recognized fundamental rights protect citizens from such discrimination.[239] Without a right protecting language choice, however, Mr. Flores could not establish that the denial of probation on the basis of language was unconstitutional.

Because probation is a privilege,[240] courts have traditionally held that it is an "act of grace" granted to a criminal defendant at the discretion of

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237. *Bearden*, 461 U.S. at 670; *see also* Mayo v. State, 861 S.W.2d 953, 956 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd) (holding *Bearden* rule does not apply when initially determining sentence). *But see* Fred Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 28 (1968) (claiming that there is little distinction between sentencing and revocation because, in both, judge has option of sending individual to prison).

238. *See* Frederick Schauer, *The Unconstitutional Conditions Doctrine: A Unifying Theory?*, 72 DENV. U. L. REV. 989, 1001–02 (1995) (noting that unconstitutional conditions doctrine does not provide substantive rights but instead is "metadoctrine" protecting other rights). *But cf.* Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (acknowledging that illegal aliens were not recognized suspect classification for equal protection purposes, and education was not fundamental right, but still upholding claim that illegal aliens could not be denied education, because to do so unfairly discriminated against children); *Shapiro*, 394 U.S. at 629–33 (holding that fundamental right to travel prohibited residency requirements for receipt of welfare benefits, even though poverty does not merit suspect classification and subsistence is not deemed fundamental right); *see also* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968) (stating that when claimants to public sector benefit have not been able to establish that benefit is fundamental right, courts have found another right on which to uphold their claim). One commentator has called this the "wealth plus fundamental right" reasoning: wealth, plus a fundamental right, earns the claimant suspect classification analysis. Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1025 (1979).

239. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (noting that unconstitutional conditions doctrine protects constitutional rights).

240. *See Flores*, 904 S.W.2d at 130 (stating that no fundamental right to probation has been identified); *see also* Escoe v. Zerbst, 295 U.S. 490, 492 (1935) (stating that probation is act of grace by government to convicted criminal and that probation has no basis in Constitution); Burns v. United States, 287 U.S. 216, 223 (1932) (affirming that probation is act of grace and not right); People v. Osslo, 323 P.2d 397, 413 (Cal. 1958) (holding that probation is act of grace granted entirely at discretion of sentencing judge); Fred Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 TEX. L. REV. 1, 6 (1968) (observing that defendants who are eligible for parole have "no enforceable claim to it" and that they may not even have "any right to be fully and fairly considered for it"); Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1023 (1986) (noting that federal courts have not

the sentencing court.[241] However, such broad and nearly unreviewable

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recognized constitutional right to rehabilitation for criminal offenders); Fred Lautz, Note, *Equal Protection and Revocation of an Indigent's Probation for Failure to Meet Monetary Conditions*: Bearden v. Georgia, 1985 WIS. L. REV. 121, 138 (noting probation is privilege, not right). Discretionary decisions are often considered to be less vulnerable to allegations of discrimination. *See Ex parte* Virginia, 100 U.S. 339, 368 (1879) (Field, J., dissenting) (claiming that Fourteenth Amendment protects only civil rights, not political rights; thus, judge could refuse to seat African-American jurors, because discretionary decisions were made on basis of merit by those with "elective authority"); Scott v. Village of Kewaskum, 786 F.2d 338, 339 (7th Cir. 1986) (stating that no property interest adheres to benefits granted on discretionary basis).

241. *See* Roberts v. United States, 445 U.S. 552, 561 (1980) (holding that judge may deny probation based on whether or not defendant cooperated with officials in investigation); *Burns*, 287 U.S. at 223 (finding probation is not right but matter of grace by court). *But see* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 849 (1994) (arguing for fundamental right to be free from incarceration); H. Richmond Fisher, *Parole and Probation Procedures After* Morrissey *and* Gagnon, 65 J. CRIM. L. & CRIMINOLOGY 46, 48 (1974) (stating that "[t]o view parole or probation as an 'act of grace' is to ignore correctional goals of the penological system"); Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023, 1068 (1986) (arguing United States should protect constitutional right to rehabilitation). The decision whether or not to grant probation can be limited somewhat by statute. *See* 18 U.S.C. § 3551(b) (1994) (stating that offenders must be sentenced to probation according to federal guidelines); *id.* § 3561 (1994 & Supp. 1995) (limiting judicial discretion by stating conditions under which federal judges may grant probation); United States v. Altamirano, 11 F.3d 52, 54 (5th Cir. 1993) (holding that court was not permitted to grant probation in lieu of fine where § 3561(a) did not permit probation). However, 18 U.S.C. § 3561 creates no liberty interest in probation. *See* 18 U.S.C. § 3561 (1994) (stating that probation *may* be granted by court). When a statute promises probation under specific circumstances, a liberty interest may lie. *See* Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (commenting that states may create liberty interest if states place "substantive limits on official discretion"); Hewitt v. Helms, 459 U.S. 460, 466 (1983) (stating liberty interests may arise from Due Process Clause or from state laws); *Greenholtz*, 442 U.S. at 10 (contending that parole statute may create expectancy of release); Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (asserting that state laws may create certain liberty interests to be protected by Due Process Clause); *see also* Abraham v. State, 585 P.2d 526, 530 n.12 (Alaska 1978) (citing constitutional provision specifying that Alaskan goals of penal system are reformation and protection of public); Solari v. Vincent, 363 N.Y.S.2d 332, 334 (N.Y. App. Div. 1975) (holding that convicted defendant possesses "earned right" to parole release when parole board is satisfied that applicant meets statutory criteria for parole), *rev'd*, 345 N.E.2d 591 (N.Y. 1976); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993) (noting that, in some cases, liberty interests are not constitutionally created but created by state law). *But see* Sandin v. Conner, 115 S. Ct. 2293, 2295 (1995) (stating that liberty interest in probation will generally arise only where restraint imposes unusual and significant hardship on prison inmates). The Texas probation statute, article 42.12 of the Texas Code of Criminal Procedure, does not give rise to a liberty interest. *See* Williams v. Briscoe, 641 F.2d 274, 276–77 (5th Cir. 1981) (finding that Texas probation statute does not create right to probation).

discretion can be dangerous, as the case of *Washington v. McSpadden*[242] vividly demonstrates. In *McSpadden*, the Texas Court of Criminal Appeals affirmed a trial court's decision to condition a burglary offender's probation on thirty days' imprisonment.[243] The sentencing judge warned the offender that if he did not respond to his questions with a "yes, sir," the court would deny his request for probation and give him thirty days instead.[244] Although the defendant answered "yes, sir" or "no, sir" approximately twenty times,[245] the judge ordered him to serve thirty days the first time he failed to do so.[246] Stating that a sentencing judge is given wide discretion in granting and conditioning probation, the Court of Criminal Appeals refused to grant the defendant's application for a writ of mandamus.[247]

Cases like *McSpadden* and *Flores* demonstrate how far judicial discretion allows judges to stray from rational sentencing determinations. Because the distinction between decisions to grant probation and decisions to revoke it are blurry and perhaps not always principled, finding a liberty interest in the decision of whether to grant probation seems reasonable. Further, because liberty is so fundamental an interest, it should not be deprived for reasons unrelated to the crime.[248] If one has a liberty interest in freedom from incarceration solely because a judge has granted that freedom, one should have an interest in fair consideration for probation arising from the state statutes that empower the judge to make that grant.

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242. 676 S.W.2d 420 (Tex. Crim. App. 1984).

243. *McSpadden*, 676 S.W.2d at 422.

244. *Id.* at 421–22. The judge said, "Let's have a 'yes, sir,' every time you say 'yes,' [sic] I want a 'sir' behind it. Do you understand that? Or you are not going to get probation, if you want probation, you are going to get 30 days. You understand that?" *Id.*

245. *Id.* at 422.

246. *Id.* at 422. The judge issued the sentence with these words, "Please think of me, Mr. Washington, every single day you spend in jail. Start saying 'sir' to people. You understand that?" *Id.* The judge further ruled out any possibility of early release for "good time." *Id.*

247. *McSpadden*, 676 S.W.2d at 422. The court noted, however, that because the judge's decision was not a "[model] of judicial behavior," Mr. Washington may be able to challenge the action on an appeal of the merits of the case or on collateral attack. *Id.* at 422 n.2.

248. *See Roberts*, 445 U.S. at 559 (stating that relevant question in sentencing defendant is whether petitioner's failure to cooperate is relevant to determination of "an appropriate sentence"); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.13 § 3(a)(4) (Vernon 1979) (stating probation may be granted when it best serves ends of justice and best interests of public as well as defendant); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 322–23 (1993) (stating that substantive due process reflects simple notion that "government must not be arbitrary"); *cf.* Griffin v. Illinois, 351 U.S. 12, 17–18 (1956) (noting that because indigency bears no rational relationship to guilt or innocence of defendant, it should not be used to impede defendant's access to appellate review).

Thus, while judges should be permitted to consider a broad range of factors in deciding whether to grant probation,[249] they should not be allowed to abuse their discretion to eviscerate the legislative goals of probation—to benefit criminal offenders and the society to which they will ultimately return.[250]

As a result, the *Flores* court might have at least held that a right to meaningful review of probation applications falls within the right to fair treatment in the criminal justice system, without going further and finding a right to probation itself.[251] Indeed, the procedural protections given in proceedings granting or revoking probation[252] are meaningless if the sentencing judge is not required to make a principled attempt to arrive at the best sentence for both the defendant and the public.[253] In *Bearden*, the Supreme Court advised that a decision to place an offender on probation reflects a "determination by the sentencing court that the State's penological interests do not require imprisonment."[254] Thus, the sentencing decision consists of evaluating the "entire background" of the offender to find the "appropriate sentence for the defendant *and crime*."[255] Unfortunately, the *Flores* decision appears to ignore these laudable guidelines.

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249. *See Bearden*, 461 U.S. at 670 (stating that sentencing court can consider defendant's entire background when deciding whether to grant probation).

250. *See McSpadden*, 676 S.W.2d at 426 (Teague, J., dissenting) (arguing that discretion to grant probation is limited by requirement that decision be rationally related to "treatment of the probationer and the protection of the public"); *see also* McClenan v. State, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (en banc) (holding that judge's refusal to consider probation where it may have been warranted amounted to violation of due process).

251. *See Flores*, 904 S.W.2d at 138 (Overstreet, J., dissenting) (noting that acknowledging such right to fair treatment need not imply substantive right to probation itself), *cert. denied*, 116 S. Ct. 716 (1996). Rather, the right could fall generally within the fair procedure rights given criminal defendants. *See Bearden*, 461 U.S. at 670 (holding that probation could not be revoked merely because indigent probationer could not pay fines); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (finding right to hearing upon probation revocation). Such an argument, of course, demonstrates the blurry lines between fair procedure and substantive rights. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 581–82 n.31 (4th ed. 1991) (describing difficulties in distinguishing procedural from substantive rights).

252. *See Bearden*, 461 U.S. at 661–62 (disallowing revocation of probation based on inability to pay fines); *Scarpelli*, 411 U.S. at 782 (providing right to hearing at probation revocation); Mempa v. Rhay, 389 U.S. 128, 137 (1967) (holding probationer has right to counsel at revocation hearing).

253. *See McClenan*, 661 S.W.2d at 110 (stating that "a court's *arbitrary* refusal to consider the entire range of punishment would constitute a denial of due process"); *cf. Flores*, 904 S.W. at 135 (Overstreet, J., dissenting) (noting that jurors are compelled to consider probation when available to defendant).

254. *Bearden*, 461 U.S. at 670.

255. *Id.* at 671 (emphasis added).

The sentencing judge did not carefully determine the appropriateness of probation in Mr. Flores's case.[256] Instead, the judge considered only one factor, language, and considered no alternatives for dealing with it.[257]

The *Flores* court justified this lack of consideration with the rationale that Mr. Flores could not benefit from English-language rehabilitation.[258] Of course, no one could benefit from rehabilitation in an incomprehensible foreign language. Nonetheless, that plainly logical fact masks the court's illogical decision. Instead, the stated goal of meaningful rehabilitation would have been more *rationally* met by accommodating Mr. Flores's language difficulty.[259] In fact, Mr. Flores may have benefitted quite well from rehabilitation provided in his own language.[260] Recalcitrance, an indication that the convicted individual had no intention of benefiting from rehabilitation, is a better reason for denying a "privilege" that at least *promises* to benefit both the individual and society. The sentencing judge, however, made no allegation that Mr. Flores exhibited such recalcitrance.[261]

C. *Trusting the Tests*

1. Making an Argument for Language Discrimination

The result of *Flores* and similar cases is that discrimination against a historically oppressed minority is allowed to stand without sufficient justification.[262] Written primarily to protect one disenfranchised minority,

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256. *See Flores*, 904 S.W.2d at 137–38 (Overstreet, J., dissenting) (stating that language ability is not sufficient criteria upon which to base sentencing decision).

257. *See id.* (noting state's concession that language was only criteria relied upon in determining sentence).

258. *Id.* at 131.

259. *See* James Harrington, *Language Barrier Doesn't Merit Jail Time*, DALLAS MORNING NEWS, Aug. 7, 1995, at A9 (stating that it would have been more rational to make attending English classes condition of probation than to put Mr. Flores in jail).

260. *Cf. Abraham*, 585 P.2d at 531 (stating that Alaskan constitutional goal of reformation benefits rehabilitated offender by enhancing "inherent dignity as a human being"). In *Abraham*, a sentencing judge denied Abraham, convicted of the assaultive death of his wife, parole because the offender spoke Yupik, and no alcohol-related rehabilitation was available in that language. *Id.* at 532. Based on the state constitution's stated penological goal of reformation, the Alaskan Supreme Court held that Abraham's request for rehabilitation for alcohol abuse entitled him to at least an evidentiary hearing. *Id.* at 533. The court stated, "We are confident that the vast resources of this state can in some way be directed to correct this all too prevalent situation, which we see on a daily basis when the courts sentence criminal offenders for alcohol-related crimes." *Id.*

261. *See Flores*, 904 S.W.2d at 135 (Overstreet, J., dissenting) (noting that only justification given for denial of Mr. Flores's probation was defendant's language deficiency).

262. *See* Flores v. State, 904 S.W.2d 129, 138 (Tex. Crim. App. 1995) (en banc) (Overstreet, J., dissenting) (observing that natural outcome of *Flores* decision will be that anyone

African-Americans, from abusive state action,[263] the Fourteenth Amendment is often used to disenfranchise other minorities, including those who do not speak English.[264] Language minorities are disenfranchised, in part, because of the courts' mechanical application of tests whose underlying purposes seem forgotten.[265]

These judicial decisions regarding language discrimination often reflect society's concerns about the demands language minorities might make on limited government treasuries or, more generally, concerns that minorities should not be encouraged in their failure to learn the "national language."[266] In other words, decisions putatively resting on firm constitutional principles may in fact rely also on policy arguments and subjective beliefs about the value of speaking English.[267] These policy arguments deserve serious and critical scrutiny, because they are an inevitable part of constitutional interpretation, and also because they play a

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in Smith County who does not speak English will be denied probation for DWI offenses), *cert. denied*, 116 S. Ct. 716 (1996).

263. *See supra* note 59 and accompanying text; *see also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding* (noting that "mischief" to be remedied by Fourteenth Amendment was discrimination against former slaves), *in* THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY 85, 101–02 (Charles Fairman & Stanley Morrison eds., 1970).

264. *Cf.* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1322–24 (1991) (arguing that equal protection tests perpetuate rather than cure racial discrimination).

265. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990) (describing instances of Supreme Court's mechanical approach to evaluating fundamental rights); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247, 251 (1990) (expressing concern that Supreme Court deals with fundamental rights in mechanical way); *cf.* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (accusing Court of "sterile formalism" and stating formalism is wrong approach under Fourteenth Amendment, which was designed to end such reasoning); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 426 (1990) (stating that "[r]esponsible constitutional interpretation requires recognition of not only the particular words shared by different constitutional provisions but also the historical and structural contexts of particular constitutional provisions").

266. *See Flores*, 904 S.W.2d at 130 (noting that people can choose to learn English); Commonwealth v. Olivo, 337 N.E.2d 904, 911 (Mass. 1975) (stating that English is language of United States and that notice in English is therefore reasonable).

267. *See* Soberal-Perez v. Heckler, 717 F.2d 36, 42 (2d Cir. 1983) (stating, "[i]t is not difficult for us to understand why the Secretary decided that forms should be printed and oral instructions given in the English language: English is the national language of the United States"), *cert. denied*, 466 U.S. 929 (1984); Pagan v. Dubois, 884 F. Supp. 25, 27-28 (D. Mass. 1995) (arguing that protection of language rights would endanger national unity); Guerrero v. Carleson, 512 P.2d 833, 836 (Cal. 1973) (offering several policy reasons, including encouragement of immigrants to learn English, to support failure to provide notice in Spanish), *cert. denied sub nom.* Guerrero v. Swoap, 414 U.S. 1137 (1974).

part in many decisions denying services or benefits to language minorities. In addition, they raise legitimate concerns about the effects of protecting language minorities or mandating accommodation of linguistic difficulties.

Perhaps the most persistent objection to providing services and benefits to language minorities is that placing such a duty on the government will unavoidably burden already-strapped local and state treasuries.[268] While making accommodations for one language, such as Spanish, may often be feasible, opponents argue that the inevitable duty to accommodate *all* languages would be too difficult and expensive to accomplish.[269] In cases where language minorities request notice or services in their own languages, opponents contend that the expense of providing such services would be an unjustified burden on state and local governments.[270]

Another difficulty presented by providing services or benefits to some languages and not others is that new equal protection problems may be created.[271] For example, implementation of the dicta in cases such as *Yu Cong Eng*[272] and *Hernandez*,[273] which at least imply that the scrutiny courts give language discrimination will depend on geographic contexts,[274] could lead to the denial of services or benefits to those non-English speakers unfortunate enough to live in communities where they constitute a small minority of the population or where there is no history

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268. *See* Vialez v. New York City Hous. Auth., 783 F. Supp. 109, 120 (S.D.N.Y. 1991) (arguing that requirement of bilingual notice would unduly burden New York Housing Authority); Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971) (stating that identifying language as suspect classification would severely burden government), *aff'd*, 475 F.2d 738 (9th Cir. 1973); *Guerrero*, 512 P.2d at 838 (listing broad range of duties that might be imposed by decisions protecting plaintiffs' putative right to notice in Spanish).

269. *See Carmona*, 325 F. Supp. at 1342 (arguing that requiring California to provide services in Spanish would also require it to do so in all languages).

270. *See id.* (stating that accommodation of all languages in government operations would be "all but impossible").

271. *See Soberal-Perez*, 717 F.2d at 42 (stating that providing Spanish translation based only on size of Latino population would violate equal protection rights of other language minorities); Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) (arguing that providing Civil Service examinations in one non-English language but not in others would amount to "invidious discrimination"); *cf.* Alfonso v. Board of Review, 444 A.2d 1075, 1077 (N.J. 1982) (stating that problem of what languages should be provided translation is best left to legislators), *cert. denied*, 459 U.S. 806 (1982).

272. 271 U.S. 500 (1926).

273. 500 U.S. 352 (1991).

274. *See Hernandez*, 500 U.S. at 371 (suggesting that context may be factor in determining how to review language discrimination cases); *Yu Cong Eng*, 271 U.S. at 524-25 (taking strength and history of Chinese community in Philippines into account in holding that government could not forbid Chinese merchants from using Chinese characters in their record keeping).

of discrimination against their national-origin group. Even Mr. Flores could arguably fare poorly under this dicta. In 1990, Latinos comprised only 5.9% of the population in Smith County, Texas, where he was arrested, tried, and sentenced.[275] If a non-English speaker from, say, Denmark, had been in Mr. Flores's position, some would argue that the *Hernandez* dicta would afford him no protection.[276]

From another angle, some opponents of interpreting the Constitution to accommodate language minorities would argue that extending such protection to any language minority would, for various reasons, be fundamentally wrong.[277] These opponents see efforts to accommodate language minorities as unnecessarily benevolent treatment for individuals who have failed or refused to learn the English language.[278] While this argument sometimes serves as a veneer to cover racist and isolationist attitudes,[279] it is also propounded by advocates for minorities and, according to some, by members of the minority groups themselves.[280]

Moreover, many of these opponents of bilingual education and other accommodations for language minorities believe that such efforts under-

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275. U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMIN., 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: TEXAS 31 (1992). Interestingly, a full third of Smith County's Latino residents are recorded as not speaking English "very well." *Id.*, SOCIAL & ECONOMIC CHARACTERISTICS: TEXAS 715.

276. *See Hernandez,* 500 U.S. at 371 (noting possibility that language of certain ethnic groups may serve as surrogate for race in equal protection analysis).

277. *See* David J. Willis, *Time We Draw the Line About Speaking English,* HOUS. CHRON., Sept. 29, 1995, at A39 (stating that if nation cannot preserve its culture by defending its language, then it is not really nation); *cf. Frontera*, 522 F.2d at 1220 (noting national interest in English as common language).

278. *See* Miguel Bustillo, *City Criticized for Printing Notices in Spanish Paper,* L.A. TIMES, Sept. 28, 1995, at B1 (describing citizen complaints that arose when municipality awarded contract to publish legal notices to low-bidding Spanish-language newspaper); Angie Cannon & Steven Thomma, *Language Wars Tap Insecurity; Battle over English Has Historical Basis for Americans*, HOUS. CHRON., Sept. 10, 1995, at 2 (reporting Congressman's proposal to abolish all federal mandates and funding for bilingual education).

279. *See* Kathryn K. Imahara & Ki Kim, *English Only—Racism in Disguise: An Analysis of* Dimaranan v. PVHMC, 23 U. WEST. L.A. L. REV. 107, 108-09 (1992) (linking advent of English-only proposals to anti-immigration movements); Kenneth L. Karst, *Essay: Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 352 (1986) (asserting that language differences provide both way to rationalize discrimination and means of accomplishing it).

280. *See* Lawrence Grey, Editorial, *English-Only Law Helps Minorities*, COLUMBUS DISPATCH, Apr. 24, 1996, at 9A (arguing that inability to speak English hurts minorities); Mauro E. Murica, Editorial, *Official Language Movement Not Same As "English Only,"* PHOENIX GAZETTE, May 29, 1993, at A15 (noting strong minority support for official English legislation). *Contra* Telephone Interview with Angela Acosta, Research Coordinator, Southwest Voter Research Institute, Inc. (Sept. 12, 1996) (suggesting that Texas Hispanic voters oppose English-only measures).

mine the goal of full equality, because they encourage non-English speakers to retain a discriminated-against trait of their ethnicity.[281] As this country's predominant language, English can be the key to employment, adequate political representation, and fair treatment in a variety of contexts, from restaurants to courtrooms.[282]

These political and social ideological concerns are openly discussed in many court decisions concerning language discrimination.[283] Although the arguments can be persuasive, they can also be unimaginative and poorly reasoned. Furthermore, they should not serve as the primary justification for the denial of constitutional rights. While the Constitution has often required that we balance one group of rights against another, it has never demanded the outright sacrifice of rights or benefits as important as the elective franchise, education, or fair treatment in the criminal courts, all of which are at risk for language minorities under law which affords them little protection.

2. Rebutting the Argument for Language Discrimination

Reviewing language discrimination claims under the strict scrutiny rubric would certainly and properly result in more successful claims against state actions, and it would also result in greater state expense. However, limits on such claims already exist; therefore, review should not interfere with *legitimate* state action, nor should it burden the states beyond their capabilities.[284] Indeed, the two-prong strict scrutiny test used to decide Fourteenth Amendment issues should still permit *necessary* discrimina-

281. *See* Shannon A. Horst, Opinion, *Why Americans, New and Old, Need English*, CHRISTIAN SCIENCE MONITOR, Dec. 12, 1989, at 19 (arguing that official-English policy would guarantee more opportunities for language minorities); *Language As Barrier*, INDIANAPOLIS STAR, Sept. 12, 1995, at A12 (stating that "numerous" studies have discredited bilingual education's ability to help children learn English).

282. *See* Ken Hamblin, Perspective, *Bilingualism Fosters Racial Strife*, DENV. POST, Nov. 5, 1995, at E-03 (maintaining that English language inability isolates immigrants in United States); Marshall Ingwerson, *In Miami, Sharp Tongues Battle over Bilingualism*, CHRISTIAN SCIENCE MONITOR, Aug. 17, 1987, at 3 (citing University of Florida study that showed Latino immigrants who cannot speak English lose 40% of their earning power).

283. *See supra* notes 267–71 and accompanying text.

284. *See Flores*, 904 S.W.2d at 138 n.3 (Overstreet, J., dissenting) (stating that predicted "parade of horribles" would not result from removing language from allowable considerations for sentencing); *Guerrero*, 512 P.2d at 842 (Tobriner, J., dissenting) (stating that "parade of horribles" is "no more than a retreat into the irrational"); *cf.* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2333 (1990) (calling "slippery slope" argument way to avoid making value judgments but also value judgment in itself, as it prevents any government protection of fundamental liberties). In an interesting historical retort to the "slippery slope" argument, one court rejected the argument that providing interpreters for non-English speaking jurors would lead to juries composed of many nationalities, all requiring interpreters, by stating that "[e]xtremes prove nothing" because

tion on the basis of language, if the government can present a compelling purpose for its actions.[285] This is a difficult standard to meet, as it should be, but not impossible.[286] A national emergency or public safety, for example, may be sufficient goals.[287] However, the encouragement of non-English speakers to learn English should not be an acceptable goal.[288] While it may be more desirable and efficient to have a nation of multilinguals,[289] we must expect that we will always have among us monol-

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"[s]uch complications are not likely to arise, where ample judicial discretion exists." Trinidad v. Simpson, 5 Colo. 65, 70–71 (Colo. 1879).

285. *See supra* note 67 and accompanying text.

286. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 905 (1986) (acknowledging that even system recognizing right to language should limit that right for some reasons, such as safety); *cf.* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (suggesting that, for equal protection cases involving affirmative action programs, strict scrutiny need not always be fatal). *But see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (asserting strict scrutiny in equal protection realm is "fatal in fact"). The Court has accepted a compelling justification only once. In *Korematsu v. United States*, Japanese-Americans protested World War II internment as violative of equal protection. 323 U.S. 214, 223 (1944). The Court, while identifying race as a "suspect" classification, went on to accept the government's compelling purpose for internment: national security. *Id.* at 218–19. This decision has been criticized on several grounds. *See id.* at 235 (Murphy, J., dissenting) (contradicting government's contention of imminent danger from all persons of Japanese dissent and asserting equal protection violation); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 809–10 n.60 (1991) (stating that flaw in *Korematsu* was that Court ignored racist stereotype implicit in government internment regulations); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 381 (1995) (noting evidence that government's justification in *Korematsu* was illusory).

287. *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 902 (1986) (stating that where communication in one language is required, such as when safety is at issue, "limited official monolingualism" should be acknowledged).

288. *See* Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1360 (1987) (contending it is unlikely that mandated monolingualism is sufficiently compelling state interest); *see also* Bill O. Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 874 (1993) (claiming assimilation justification masks race-based motivations).

289. *See* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (stating, "[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution"); *see also* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 899–900 (1986) (stating that rise in Spanish immigration and increased international business relationships are good reasons to encourage multilingualism); *cf.* Yniguez v. Arizonans for Official English, 69 F.3d 920, 923 (9th Cir. 1995) (stating American tradition of accommodation and tolerance are as important as goals of assimilation).

inguals who do not speak the language of the majority.[290] To use their language handicap against them unnecessarily is fundamentally unfair.[291]

Additionally, meaningful application of the two-prong strict scrutiny test should involve serious attention to the second prong: the relationship between the permissible goal and the state response.[292] In looking at the fit between the purpose and the act, the Supreme Court in equal protection cases has allowed the states to discriminate on the basis of certain traits, even when those traits are closely related to a group generally meriting heightened scrutiny, as long as the traits are relevant to a legitimate state goal.[293] Traditionally, the Court has given such trait-based discrimination minimal scrutiny.[294] However, when the trait is related intimately to a suspect group, this potentially invidious relationship should warrant

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290. *See* DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS? 192 (1990) (stating that Americans have always had to confront reality of large numbers of non-English speakers); Joshua A. Fishman, *Language Maintenance in a Supra-Ethnic Age: Summary and Conclusions* (discussing language-maintenance efforts among United States ethnic groups, including foreign-language presses, broadcasting, cultural organizations, and "group schools"), *in* LANGUAGE LOYALTY IN THE UNITED STATES 392, 392–93, 1978.

291. *See* United States v. Mosquera, 816 F. Supp. 168, 173 (E.D.N.Y. 1993) (stating, "Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to this [sic] shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy.") (quoting United States *ex rel.* Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970); Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 159 (1985) (arguing that refusing to recognize language differences results in aiding dominant group and hurting minority). Language intolerance also does not speak well of a society that prides itself on tolerance. *See* William G. Ross, *A Judicial Janus*: Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 167 n.238 (1988) (observing that in *Meyer*, petitioner argued that anti-German statutes mirrored "Prussian theory of State," which gave state power to do whatever it deemed necessary without regard to constitution).

292. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–20 (1972) (describing cases where Supreme Court strengthened ends/means test and overturned legislation under rational basis review).

293. *See Hernandez*, 500 U.S. at 365 (allowing peremptory challenge of Spanish-speaking juror because of perceived inability "to defer to the official translation of Spanish-language testimony"); Geduldig v. Aiello, 417 U.S. 484, 496–97 n.20 (1974) (holding discrimination on basis of pregnancy is not discrimination on basis of gender). *But see* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 468–69 (1985) (Marshall, J., dissenting) (stating that traits may be relevant under some circumstances, but not relevant under others).

294. *See Cleburne*, 473 U.S. at 441–42 (stating that discrimination against mental retardation requires only rational basis); *Geduldig*, 417 U.S. at 496–97 n.20 (holding that discrimination on basis of pregnancy is not gender-based discrimination); *see also Flores*, 904 S.W.2d at 136 (Overstreet, J., dissenting) (describing various levels of review used by Supreme Court).

strict scrutiny,[295] and the Court should then seriously review the relevancy of the trait to the states' compelling purpose.[296] Even though such review would result in more successful equal protection claims, attention to the relevancy of the classification to compelling state purposes could also allow states more flexibility to meet urgent needs, if the courts bring meaningful and considered interpretation to the constitutional standards they apply.[297] Of course, similar attention should also be given to the relationship between ends and means in the realm of due process fundamental rights.

Significantly, although strict scrutiny should be the appropriate standard in cases of language discrimination, strict scrutiny analysis was not a necessary predicate for a ruling in Mr. Flores's favor. In denying Mr. Flores's claim, the court not only quickly disposed of the suspect classification argument,[298] but also gave no meaningful consideration to the default standard—the minimal scrutiny, rational basis test.[299] This test requires at least that the state's chosen means be rationally related to its goal.[300] 'Rationally related' must mean more than 'merely conceivable'; otherwise, *any* stated reason would suffice.[301] However, the court gave

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295. *See Flores*, 904 S.W.2d at 136 (Overstreet, J., dissenting) (noting close relationship between language and race or national origin); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761, 763–64 & n.8 (observing that some traits are "super-correlated" to suspect classifications and may deserve special scrutiny).

296. *Cf. Cleburne*, 473 U.S. at 453 (Stevens, J., concurring) (arguing that even rationality review should pay attention to relevance of class to valid state goal).

297. *See id.* at 453 (noting attention to relevancy of trait to state goal will result in "differing results" for classification based on alienage, gender, or illegitimacy, rather than in automatic validation or invalidation for other classifications).

298. *See Flores*, 904 S.W.2d at 130 (asserting that, for purposes of suspect classifications, language fluency is not equivalent to race or national origin).

299. *See id.* at 131 (finding, in two sentences, legitimate state interest in sentencing adequate to support denial of probation on basis of language).

300. Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961); *Flores*, 904 S.W.2d at 130–31; *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314–15 (1976) (finding age classification rationally related to goal of prepared police force).

301. *See Cleburne*, 473 U.S. at 452 (Stevens, J., concurring) (stating that rational-basis review should examine legitimacy and neutrality of state goal); Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93, 98 (1994) (noting that literal reading of rational-basis test required little more than "minimal sanity" by legislature in enacting measure); *see also Cleburne*, 473 U.S. at 448 (asserting that discriminatory zoning law is unconstitutional under rational-basis review); Zobel v. Williams, 457 U.S. 55, 65 (1982) (calling state law discrimination on basis of residency unconstitutional under minimal scrutiny test). It is not clear whether this more stringent rationality review is really rationality review or, perhaps, a version of intermediate scrutiny. *See Cleburne*, 473 U.S. at 459 n.4 (Marshall, J., dissent-

no serious attention to the fit between the court's stated goal and its chosen means.[302] The purported rationale for the decision to deny Mr. Flores probation was that meaningful rehabilitation could not be achieved.[303] However, meaningful rehabilitation is no more achieved by a year's incarceration than by classes in a language one does not understand.[304] The denial of rehabilitation is not the same as meaningful rehabilitation, and a year in jail might even contravene this goal. Furthermore, if the judge's reason for not providing an interpreter for Mr. Flores was economic, then the judge should have given some consideration to the relative expense of a year's incarceration in comparison to provision of an interpreter for an alcohol rehabilitation program.[305]

VII. CONCLUSION

While a mechanical interpretation of the Fourteenth Amendment can produce the *Flores* decision and decisions like it, more thoughtful interpretations are available. As a member of a monolingual language minority, Mr. Flores faced a combination of difficulties. First, because he was a member of a group that was not identical to one based on race or national origin, he could not claim suspect classification for equal protection purposes. Second, because the trial judge denied Mr. Flores a state privilege rather than a fundamental right, he could not complain of the denial under a due process theory. But however blindingly logical these two analyses appear, their result is that a group comprised only of national origin minorities may be discriminated against and arbitrarily denied state privileges on the basis of language.

The Supreme Court recently denied certiorari for the *Flores* case, thus foreclosing for now the consideration these issues deserve. However, had the Court reviewed the case,—and, in light of current English-only drives and animosity toward immigrants, it should have—the Court could have

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ing) (stating that cases invalidating legislation under "rational review" are better seen as applying intermediate-level review).

302. *See Flores*, 904 S.W.2d at 138 (Overstreet, J., dissenting) (noting that county provision of interpreter would have satisfied court's stated goal of meaningful rehabilitation).

303. *Id.* at 131.

304. *See* James Harrington, *Language Barrier Doesn't Merit Jail Time*, DALLAS MORNING NEWS, Aug. 7, 1995, at A9 (arguing that requiring Mr. Flores to take English class would have made more sense).

305. *See id.* (noting that *Flores* decision increased burden on taxpayers rather than lessened it). The cost to maintain a prisoner for a year in a Texas prison is $17,000 per year. Robert Stanton, *Don't Drop Out: Neighborhood, Other Groups Make Students Their Business*, HOUS. POST, May 21, 1994, at A21. Texas provides for the payment of interpreters to fall between $15 and $100 per day, at the court's discretion. TEX. CODE CRIM. PROC. ANN. art. 38.30(b) (Vernon Supp. 1996).

demonstrated that Fourteenth Amendment analysis can be more flexible than the mathematical formula the Texas Court of Criminal Appeals applied. The Court could have reached a different result by declaring language-based discrimination to be suspect, either because language is presumptively related to national origin, or because it is often, by itself, the basis of invidious discrimination. Further, the Court could have relied on the ethnic and linguistic makeup of Texas to reach this conclusion, pointing to the historical discrimination against Spanish-speaking citizens in the state. Finally, the Court also could have eschewed the race/language nexus requirement, thus effecting the purpose of the Fourteenth Amendment, which is to protect the rights of politically powerless minorities.

Alternatively, the Court could have taken seriously the rational-basis test mechanically relied upon to deny Mr. Flores's claim. Even minimal scrutiny merited an examination of the fit between denying Mr. Flores's probation request and the stated goal of meaningful rehabilitation. Additionally, even if the trial judge had been motivated by economic concerns, the decision to deny Mr. Flores probation defies rationality.

Furthermore, the Court could have taken the bold step of asserting that a state actor must mete out fair treatment to language minorities in the criminal justice system. Were the Court to make such a bold assertion, it would be finding a liberty interest in the decision of whether or not to grant probation. Such an interest could not, of course, guarantee probation, but it would ensure that offenders like Mr. Washington, who lost his chance at probation for failing to speak the magic words ("yes, sir"), and Mr. Flores, who lost his chance for failing to speak the right language, would receive serious and rational review of their probation requests.