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## ANOTHER VIEW OF *Montero v. Meyer* and the English-Only Movement: Giving Language Prejudice the Sanction of Law

*As whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion.*

*Will Latin American migrants bring with them the tradition of the mordida (bribe), the lack of involvement in public affairs, etc.?*<sup>1</sup>

The memorandum above is but one indication of the hidden racism that motivates the English-only movement. Behind the facade of benign paternalism is an effort to erase the gains made by minorities during the civil rights era and create greater divisions within our society. Proponents of English-only contend that declaring English the "official" language of the United States will promote national unity.<sup>2</sup> By focusing on language, the English-only proponents can avoid addressing the real targets of their attack, the Hispanic immigrants. Language is only the signal to identify these people and deny their basic rights of citizenship.<sup>3</sup>

Recently, tactics used by the proponents of English-only were challenged in court.<sup>4</sup> In parallel cases out of Colorado and Florida, the plaintiffs challenged the failure to print initiative petitions in a second language where required by the Voting Rights Act.<sup>5</sup> In both cases, the federal courts of appeals found that the Act does not apply to initiative petitions.<sup>6</sup> The plaintiffs then petitioned for certiorari to the United States Supreme Court. However, in July 1989, the Supreme Court refused to hear the plaintiffs' appeals.<sup>7</sup> For the reasons stated below, the authors of this article believe that the Court should have addressed this issue.

This article begins by placing the legal issues raised in the present litigation in the proper social context. Part I examines the goals of the English-only movement, and the immediate threat posed to minority voting rights. Comparisons are made to this nation's dark history of polling abuses, which Congress sought to correct by passing the Voting Rights Act. Part II of this Note applies the Voting Rights Act to the case

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1. Excerpt from a memorandum written in 1986 by Dr. John Tanton, co-founder of "U.S. English." A. CALIFA, DECLARING ENGLISH THE OFFICIAL LANGUAGE: PREJUDICE SPOKEN HERE I, 55 n.221 (1989) (available through Legislative Council Washington, ACLU, 122 Maryland Avenue NE, Washington, D.C. 20002).

2. For a good discussion on this point see Leibowicz, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE L. & POL'Y REV. 519 (1985).

3. CALIFA, *supra* note 1, at 56.

4. See *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988); *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

5. *Montero*, 861 F.2d at 603; *Delgado*, 861 F.2d at 1489.

6. *Montero*, 861 F.2d at 607; *Delgado*, 861 F.2d at 1493.

7. *Montero*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3249 (1989); *Delgado*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3242 (1989).

arising out of Colorado, *Montero v. Meyer*.<sup>8</sup> By failing to print initiative petitions in minority languages, the English-only defendants in *Montero* effectively denied the right of minority citizens to participate in this process of amending the state constitution. As this case illustrates, the English-only movement is a direct assault on the values fostered during the civil rights era.

### I. THE GOALS OF THE ENGLISH-ONLY MOVEMENT

There are two factions supporting English-only legislation: "English First" founded by Lawrence Pratt, a Virginia state legislator; and "U.S. English" ("USE") founded by Dr. John Tanton and former Senator S.I. Hayakawa.<sup>9</sup> Public figures such as Arnold Schwarzenegger, Alistair Cooke, and Walter Cronkite have all served on the Board of Advisors of USE.<sup>10</sup> Dr. Tanton was also founder of the Federation of American Immigration Reform ("FAIR"), a group lobbying for stricter immigration policies.<sup>11</sup>

In 1986, leaders of the English-only movement met at the WITAN IV conference.<sup>12</sup> In a private memorandum written for the conference Tanton asked: "How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with non-Hispanic influence?"<sup>13</sup> Dr. Tanton's writings indicate that the English-only movement is not simply a struggle over language, but between races:

In the California of 2030, the non-Hispanic Whites and Asians, will own the property, have the good jobs and education, speak one language and be mostly Protestant and 'other.' The Blacks and Hispanics will have the poor jobs, will lack education, own little property, speak another language and will be mainly Catholic. Will there be strength in this diversity? or [sic] will this prove a social and political San Andreas Fault?<sup>14</sup>

It is easy to forget that this country was built as a nation of immigrants. Immigrants have enriched our culture, including our language, injecting it with vitality that is essential to our continued cultural development. Immigrants have provided our nation with leaders, as well as farmers and merchants, and with entrepreneurs, as well as laborers.<sup>15</sup> Immigrants have reinforced our belief in America as a unique land of

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8. 861 F.2d 603 (10th Cir. 1988).

9. CALIFA, *supra* note 1, at 11-12.

10. *Id.* at 13.

11. *Id.* at 12.

12. "Witan" is derived from an Old English word meaning "members of a council of wise men." CALIFA, *supra* note 1, at 53 n.217 and accompanying text.

13. *Id.* at 55 n.221 and accompanying text. As a result of this publication, both Walter Cronkite and Linda Chavez resigned from USE, fearing the impact on the Hispanic community.

14. *Id.* at 56 n.225.

15. For a good discussion of immigration at the turn of the century see R. GINGER, *THE AGE OF EXCESS* (1975).

opportunity, having left their homes with the hope of finding something better.

Numerous immigrant groups have confronted hostility upon their arrival in America. In the last half of this century and as a result of revolutions and stagnating economies in third world countries, the immigrants have been primarily Southeast Asians, Cubans, Puerto Ricans, and Mexicans—all non-Anglos and most non-English speaking.

The leaders of English-only fear these newest groups of non-Anglo immigrants. This fear is prompted, in part, by the belief that these immigrants have different values that are incompatible with the majority of English-speaking Americans.<sup>16</sup> Furthermore, they have the opportunity to assert these values as a formidable voting force.

#### A. *The Voting Rights Act*

Throughout our country's history different groups have demanded greater power to influence political decision making. Initially, these demands were perceived as a threat to the established political order. Persons without property interests, women, and blacks all have had to overcome difficult obstacles to obtain the right to vote.<sup>17</sup> The history of the enfranchisement of language minorities has been no different. Our experience has taught us, however, that whenever a group has been extended this right, it has not weakened our system of government, but has strengthened it. The democratic franchise provides minority groups with a valuable outlet for political expression.

In 1870, the fifteenth amendment to the United States Constitution extended to blacks the right to vote.<sup>18</sup> However, states were able to circumvent the intent of the fifteenth amendment through numerous methods. These included grandfather clauses, property qualifications, good character tests, gerrymandering, poll taxes, and requirements that the applicant be able to read and interpret materials.<sup>19</sup>

The persistence of states in seeking new means of circumventing the fifteenth amendment is illustrated by two Texas cases. In *Smith v. Allwright*, the Supreme Court declared that political parties could not restrict their primary elections to whites only.<sup>20</sup> "When primaries become a part of the machinery for choosing officials, . . . the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."<sup>21</sup>

In an effort to evade the ruling of *Allwright*, the whites-only Jaybird Democratic Association held pre-primary elections; the successful candi-

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16. Leibowicz, *supra* note 2, at 546.

17. See, e.g., L. BANNER, ELIZABETH CADY STANTON (1980).

18. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

19. *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966).

20. 321 U.S. 649 (1944).

21. *Id.* at 664.

date would then go on to run in the Texas Democratic primary. The Supreme Court struck down this purportedly private action in *Terry v. Adams*.<sup>22</sup> The Court reasoned that "the constitutional right to be free from racial discrimination in voting 'is not to be nullified by a state casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.'"<sup>23</sup>

As *Terry* illustrates, the fifteenth amendment applies to any private actions serving an important electoral function. A state cannot delegate a traditional state function to a private individual to avoid the reach of the Voting Rights Act. In *Montero v. Meyer*, the English-only defendants argued that the distribution of initiative petitions is a private action, outside the purview of the fifteenth amendment.<sup>24</sup> However, to say that the circulation of initiative petitions by individuals is not state action flies in the face of *Terry v. Adams*.

Since *Terry*, Congress has repeatedly attempted to formulate legislation that would eliminate the problems of voter discrimination. The Civil Rights Act of 1957, the perfecting amendments in the Civil Rights Act of 1960, and Title 1 of the Civil Rights Act of 1964 were efforts by Congress to outlaw methods used to deny minorities the right to vote.<sup>25</sup>

Despite the efforts of the Justice Department, these laws did little to curtail the problem:

Even when favorable decisions have finally been obtained, some of the states affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [black] registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.<sup>26</sup>

In 1965, Congress passed the Voting Rights Act.<sup>27</sup> Its intent was to remedy the use of methods, which previously denied people of color the right to vote.<sup>28</sup> The Act is broadly based and written in terminology that is general and expansive in definition. It is written to give notice to the states that any test, device, procedure, or standard which infringes on the voting rights of minorities, no matter how subtle, will not be tolerated.<sup>29</sup>

During congressional hearings, Senator Fong voiced his concern that the word "procedure," as used in section 2 of the Voting Rights Act, would not be broad enough to cover the various abuses employed by states to subvert the Voting Rights Act.<sup>30</sup> Attorney General Katzen-

22. 345 U.S. 461, 465-69 (1953).

23. *Id.* at 466 (quoting *Smith v. Allwright*, 321 U.S. 649, 664 (1944)).

24. 861 F.2d at 609.

25. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

26. *Id.* at 314.

27. 42 U.S.C. §§ 1971-1974 (1982).

28. *See id.* at § 1971.

29. *Id.*

30. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 & n.31 (1969); Voting Rights Act, Pub. L. No. 89-110, title I, § 2, 79 Stat. 437 (redesignated at 42 U.S.C. § 1973).

bach, who was instrumental in drafting the Voting Rights Act, explained that the word "procedure" should include any kind of practice that would deny or abridge the right to vote because of color or race. Katzenbach suggested substituting the word "procedure" with the phrase "standards, practices or procedures."<sup>31</sup> Congress adopted this broader language to give the Voting Rights Act the scope necessary to prevent further infringement of minority voting rights.<sup>32</sup>

The Voting Rights Act also covers changes made in the electoral process. Before making any changes, jurisdictions covered by 42 U.S.C. § 1973(b) must submit their proposals to the Attorney General or obtain a declaratory judgment from the district court in Washington, D.C.<sup>33</sup> Changes in voting procedures will only be approved if they do not abridge the voting rights of minority citizens.<sup>34</sup> Previous experiences, exemplified by *Allwright* and *Terry*, had taught the Justice Department that as fast as they could declare one device illegal, the states would find another means of carrying out their discriminatory intent.<sup>35</sup>

In the 1969 decision, *Allen v. Board of Elections*, the Supreme Court heard four cases that involved the application of the Voting Rights Act.<sup>36</sup> In *Whitley v. Williams*, appellants challenged a Mississippi law that revised the nominating petition process.<sup>37</sup> Although *Allen* was decided pursuant to section five covering election procedure changes, Chief Justice Warren, finding support for his ruling in the legislative history, determined that the Voting Rights Act was applicable to procedural changes in the petition process.<sup>38</sup>

In hearing, the Attorney General Katzenbach remarked there were two or three types of changes that may be specifically excluded from section five, such as changing from a paper ballot to voting machines. He emphasized, however, that there were "precious few" changes that could be excluded "because there are an awful lot of things that could be started for purposes of evading the fifteenth amendment if there is the desire to do so."<sup>39</sup> Congress chose not to include these minor exceptions in section five, indicating their intent that all changes be subject to section five scrutiny.<sup>40</sup>

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31. *Allen*, 393 U.S. at 566-67 n.31.

32. 42 U.S.C. § 1973(a) (1982).

33. *Id.* at § 1973c.

34. *Id.*

35. As Attorney General Katzenbach commented:

Our experience in the areas that would be covered by this bill has been such as to indicate frequently on the part of State legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States. . . . [A]s the chairman may recall . . . at the time of the initial school desegregation, . . . the legislature . . . passed a law to frustrate that decree.

*Allen*, 393 U.S. at 567-68.

36. 393 U.S. 544 (1969).

37. *Id.* at 551.

38. *See id.* at 566-68. Voting Rights Act, Pub. L. No. 89-110, title I, § 5, 79 Stat. 439 (redesignated and amended at 42 U.S.C. § 1973c).

39. *Allen*, 393 U.S. at 568.

40. *Id.*

In 1975, the Voting Rights Act was extended to cover language minorities.<sup>41</sup> As the basis for this extension, Congress had determined, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation.<sup>42</sup>

Since 1975, America has been coming to grips with a newly evolving political and economic scene. Vietnam, Nicaragua, Third World debt, and our declining world economic dominance have forced us to reevaluate our role as a world leader. For many Americans this reevaluation has caused anxieties and fears about an uncertain future. The movement to declare English the "official" language is a product of this fear.<sup>43</sup>

Numerous bills have been introduced in Congress to ban bilingual education and declare English the "official" language. Although these efforts were soundly defeated, the proponents of English-only have not relented. On September 15, 1988, California Representative Norman D. Shumway introduced the latest legislation, which has been endorsed by USE.<sup>44</sup> The bill contains exceptions for bilingual education, teaching foreign languages to students proficient in English, the use of court translators, and the use of a language other than English for health or safety reasons.<sup>45</sup> There is no exception, however, for multilingual election materials.<sup>46</sup> The Shumway bill is one more attempt to defeat the Voting Rights Act.

Contrary to the assertions of English-only proponents, abolishing the use of multilingual election materials will effectively deny the voting rights of those citizens who are not fluent in English. In fact, this is precisely what has happened in *Montero v. Meyer*.<sup>47</sup> By failing to print initiative petitions in minority languages, the proponents of English-only effectively excluded non-English speaking citizens from participating in the first step of amending the Colorado constitution. The Voting Rights Act is intended to address precisely this kind of concerted effort to disfranchise voters.

## II. APPLICATION OF THE VOTING RIGHTS ACT TO *Montero v. Meyer*

Congress amended the Voting Rights Act in 1975 to protect the electoral privileges of language minority citizens.<sup>48</sup> The amendments to

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41. See 42 U.S.C. § 1973aa-1a (1982).

42. *Id.* at § 1973aa-1a(a).

43. See CALIFA, *supra* note 1, at 1-13.

44. *Id.* at 18 n.81.

45. *Id.*

46. *Id.*

47. 861 F.2d 603 (10th Cir. 1988).

48. 42 U.S.C. § 1973(a).

the Act require states to provide election materials in a second language in every jurisdiction where the illiteracy rate is higher than the national average and at least five percent of the voting population does not speak English.<sup>49</sup> This requirement applies whenever any state "provides" any "materials or information relating to the electoral process."<sup>50</sup>

Applying this language to the case of *Montero v. Meyer* raises two issues of statutory interpretation.<sup>51</sup> The first issue is whether petitions to initiate a constitutional amendment are "materials or information relating to the electoral process." The second issue is whether the state "provides" petitions when regulating and approving the form of those petitions, when its officials assist in formulating the content of the initiative, and when an elected state official uses state funds to promote the initiative. In short, the issue is whether these acts are considered "state action" for purposes of the Voting Rights Act.

A. *Do the Language Provisions of the Voting Rights Act Apply to Initiative Petitions?*

To find an exemption from the Voting Rights Act, the English-only proponents claim that initiative petitions are not "materials or information relating to the electoral process." This assertion is untenable under a plain reading of the Voting Rights Act.

As a prerequisite to placing initiatives on the ballot, petitions have a clear relation to the electoral process. When deciding whether to sign a petition, voters make an important choice that will determine whether a proposed amendment will be placed on the ballot. The English-only proponents would exclude from this process those citizens who are not proficient in English.

1. Interpretation of the Voting Rights Act by the United States Attorney General

In *Montero v. Meyer*, Colorado state election officials failed to comply with the language provisions of the Voting Rights Act.<sup>52</sup> When drafting the Voting Rights Act, Congress chose not to leave such important rights of citizenship to the exigencies of state and local officials. Such a system would be ripe for abuse and was expressly rejected by Congress. Instead, Congress gave broad enforcement powers to the United States Attorney General.<sup>53</sup>

On July 20, 1976, the Department of Justice promulgated regulations stating that the written materials covered by the Voting Rights Act include "petitions."<sup>54</sup> Consistent with the statute, these regulations

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49. *Id.* at § 1973c.

50. *Id.* at §§ 1973aa-1a(c) & 1973b(f)(4).

51. 861 F.2d 603 (10th Cir. 1988).

52. *Id.*

53. See 42 U.S.C. § 1973 (1982).

54. 28 C.F.R. § 55.19(a) (1988). The identical language was contained in a notice of official rule making issued on April 21, 1976. 41 Fed. Reg. 16,773 (1976).



place an affirmative duty on the states to interpret and enforce the Voting Rights Act: "It is the obligation of the jurisdiction to decide what materials must be provided in a minority language."<sup>55</sup>

The Tenth Circuit Court of Appeals interpreted this language to mean that the "jurisdiction" is vested with discretion to determine what materials are covered by the Voting Rights Act.<sup>56</sup> Such a reading brings the regulations into direct conflict with the remedial goals of the statute. When enacting the Voting Rights Act, Congress was faced with recalcitrant state officials who sought to obstruct minority access to the electoral process at every turn. Vesting these same state officials with discretionary powers would render the Act meaningless.

The Justice Department recently reaffirmed its position in an amicus brief filed in the case of *Delgado v. Smith*: "The Attorney General has consistently interpreted Section 4(f)(4) as covering petitions."<sup>57</sup> Judicial deference to the Justice Department's regulations is appropriate in the present case for two principle reasons. First, it is well established that the interpretation of a statute given by its enforcing agency is entitled to great judicial deference.<sup>58</sup> The rationale behind this rule is particularly compelling in this case, since the Attorney General played a major role in drafting the Voting Rights Act and explaining its operation to Congress.<sup>59</sup>

Second, Congress had an opportunity to address this issue in 1982 when it extended the language provisions of the Voting Rights Act. During the congressional hearings, the Justice Department provided copies of the regulations, along with a letter stating that the bilingual provisions applied to petitions.<sup>60</sup> Being fully aware that the implementing regulations applied the Voting Rights Act to petitions, Congress ex-

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55. 28 C.F.R. § 55.19(a) (1988).

56. *Montero*, 861 F.2d at 608-09. The Tenth Circuit's interpretation of the regulations breaks two fundamental rules of construction. First, wherever possible, regulatory provisions should be read in harmony. In this case, the regulations can be read consistently by understanding the first provision to mean that each jurisdiction has an affirmative duty to interpret and enforce the Voting Rights Act, and by understanding the second provision to mean that a reasonable interpretation by such jurisdiction would include "petitions" as material covered by the Act. The Tenth Circuit made no attempt to harmonize these provisions.

Second, a specific provision in a regulation controls over a general provision. In this case, the section listing "petitions" among election material covered by the Voting Rights Act specifically addresses the issue of whether the Act covers petitions. Thus, even if the disputed provisions cannot be read in harmony, the latter provision will prevail since it directly addresses the issue.

57. Amicus brief for the United States at 1, 22, *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

58. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

59. See *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987); *United States v. Board of Commissioners*, 435 U.S. 110, 131 (1978); *Perkins v. Matthews*, 400 U.S. 379, 391-92 (1971).

60. See *Extension of the Voting Rights Act: Hearings on the Extension of the Voting Rights Act Before the Subcomm. on Civil Rights of the House Comm. on the Judiciary: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1790 (1982).*

tended the Act without amendment.<sup>61</sup>

## 2. What is "Voting?"

Recognizing the often elusive quality of state-sanctioned voting discrimination, Congress adopted a remedial scheme consummate to the task. The Voting Rights Act applies a broad definition of the term "voting" to include "all action necessary to make a vote effective in any primary, special or general election," including all actions "required by law prerequisite to voting."<sup>62</sup>

The proponents argue that the petition process is not an "action required by law prerequisite to voting." To the contrary, Colorado law prescribes in detail the steps that must be taken by the petitioner.<sup>63</sup> These steps are required by law and are a prerequisite to placing an initiative on the ballot for voting. If the petitioner fails to gather a sufficient number of signatures, the initiative will not be included on the ballot. This process is clearly within the terms of the Voting Rights Act.

To advance the remedial objectives of the Voting Rights Act, the Supreme Court has applied an expansive reading to the term "voting."<sup>64</sup> In *Allen v. State Board of Elections*, the Court held a state reapportionment plan to be within the terms of the Act.<sup>65</sup> The Court stated that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'"<sup>66</sup>

The Tenth Circuit Court of Appeals tried to avoid this expansive definition of the term "voting" by making reference to dictionary definitions.<sup>67</sup> The court found that implicit in the definition of the concept of voting is "the presence of choice."<sup>68</sup> The court, however, failed to apply this judicially contrived definition in a sensible manner when it stated that the petition process "provides no choice."<sup>69</sup> The choice in the petition process is clear: to sign or not to sign. It is this choice that determines whether the initiative will be placed on the ballot.

As an example of covered activities, the Voting Rights Act lists voter registration.<sup>70</sup> In Colorado, only registered voters can sign an initiative petition.<sup>71</sup> This fact is significant, first because it shows that the Voting Rights Act reaches activities that occur prior to signing a petition. Second, and more fundamentally, the registration requirement reflects the importance of the constitutional initiative process. It is this process that will determine whether a proposed initiative will be placed on the ballot.

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61. 42 U.S.C. § 1973 (1982).

62. 28 C.F.R. § 51.2 (1988).

63. COLO. REV. STAT. § 1-40-101 to -109 (1973 & Supp. 1988).

64. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969).

65. *Id.* at 570-71.

66. *Id.* at 565-66.

67. *Montero v. Meyer*, 861 F.2d 603, 607 (10th Cir. 1988).

68. *Id.*

69. *Id.*

70. 28 C.F.R. § 51.2 (1988).

71. COLO. REV. STAT. § 1-40-106(2) (1973 & Supp. 1988).

The state has a compelling interest in ensuring that this process of amending the state constitution is conducted in a fair and orderly manner. The Voting Rights Act advances this important state interest by ensuring that the power of initiative is open to all qualified voters.

The power to amend the state constitution should not be construed narrowly. In addition to the actual signing of a petition, the initiative process includes public education and debate. Providing petitions in minority languages aids this process by alerting language minority citizens to the issues at stake. Once aware of the issues, these citizens can fully exercise their democratic right to participate in the debate; they can do so formally, through political parties and coalitions, or informally, by discussing the issues among friends. By refusing to print petitions in minority languages, the English-only proponents effectively excluded minority citizens from this process.

B. *Did the State "Provide" Election Material in *Montero v. Meyer* Within the Meaning of the Voting Rights Act?*

Admittedly, the Voting Rights Act applies to "state action" and not private political speech such as the distribution of leaflets.<sup>72</sup> However, the actions taken by the Official English Committee and state officials during the initiative process in *Montero v. Meyer* are a far cry from the private actions exempt from the Voting Rights Act.

1. *Actions Taken by the State in *Montero v. Meyer**

To fully appreciate the issue of "state action," it is necessary to look at the petition process in detail. The move in Colorado to put the English-only amendment on the ballot was initiated by State Representative Barbara Anne Philips. In 1987, Representative Philips introduced a bill making English the official language of Colorado.<sup>73</sup> After the bill was defeated in the legislature, Representative Philips and the Official English Committee began work toward a state-wide referendum.<sup>74</sup>

As required by state law, Representative Philips first submitted a draft of her proposal to the Colorado Legislative Council and the Legislative Drafting Office for review and comment.<sup>75</sup> These two state agencies sent Representative Philips a report containing their proposals and comments, which she discussed with the staff members of the agencies. Two days after this meeting, Representative Philips formally submitted her initiative proposal to the Colorado Secretary of State.<sup>76</sup>

The proposal incorporated two provisions added as a result of Rep-

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72. The proponents of English-only argue that requiring petitions to be printed in a minority language infringes the first amendment rights of petitioners. To the contrary, the remedial tools used by the Voting Rights Act are narrowly tailored to promote a significant governmental interest. The Act expands the political speech of language minority citizens, while placing a minimal burden on petitioners.

73. *Montero v. Meyer*, 696 F. Supp. 540, 541 (D.Colo. 1988).

74. *Id.*

75. *Id.* at 543.

76. *Id.*

representative Philips' meeting with staff members of the two state agencies. After receiving the proposal, the Secretary of State issued notices of a public hearing to be held before a three-member state title board. The board set the ballot title and submission clause for the initiative, and prepared a summary of its contents. This information was included in the printed petition forms, along with the language of the proposed amendment. As a final step, a state elections officer corrected and approved the actual petition forms used by the Official English Committee.<sup>77</sup>

While Representative Philips used government resources at several points in the petition process, a finding of "state action" should not hinge upon this fact. The intimate involvement of state officials in the statutory petition process should be a sufficient ground to find "state action." The issue of whether statutorily mandated state action is enough to bring the Voting Rights Act into play will receive its proper focus in the parallel case from Florida, *Delgado v. Smith*, where the claim of "state action" does not rely upon the spending of government funds.<sup>78</sup>

2. *Is the Statutory Process of Amending the State Constitution "State Action?"*

The language provisions of the Voting Rights Act apply whenever any state "provides" any "materials or information relating to the electoral process."<sup>79</sup> In *Montero v. Meyer*, the state dictated the form, as well as the content of the petition.<sup>80</sup> The actual language of the proposed constitutional amendment was reformulated as a result of discussions with state officials. Most importantly, state officials approved the fact that the petitions would only be printed in English.

The English-only proponents claim that these actions are merely regulatory and, therefore, exempt from the Voting Rights Act. This argument misstates the issue. The issue is not whether these actions are regulatory, but whether "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself."<sup>81</sup> In the present case, the requisite "nexus" is established by the intimate involvement of state officials setting the form and content of the petitions. The state, in effect, "provides" election materials and is therefore active in the petition process.

The initiation of proposed constitutional amendments is traditionally a function of government. In Colorado, prior to 1910, state constitutional amendments could be proposed only through actions of elected officials or delegates. In 1910, the power to propose constitutional

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77. *Id.*

78. 861 F.2d 1489 (11th Cir. 1988).

79. 42 U.S.C. §§ 1973aa-1a(c) & 1973b(f)(4).

80. 861 F.2d 603 (10th Cir. 1988).

81. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

amendments was given to the people.<sup>82</sup> This power was given to all of Colorado's citizens, not just those who speak English.

#### CONCLUSION

The political struggle over the democratic franchise did not end with passage of the fifteenth amendment.<sup>83</sup> Starting with Jim Crow laws, the white majority sought to obstruct minority voting rights through more insidious means like gerrymandering and poll taxes. Though more subtle, the new forms of discrimination were no less pernicious. When Congress sat down to draft the Voting Rights Act in 1965, it sought to engender a higher notion of democracy—an idea of democracy based on a process of inclusion to achieve full political equality.

The struggle over the democratic franchise continues today. The goals of the Official English movement are not limited to amending the constitutions of individual states. Legislation has been introduced in Congress that would ban bilingual education and prohibit multilingual ballots.<sup>84</sup> Such legislation, if passed, would arguably violate the constitutional guarantees of equal protection and substantive due process. With this in mind, the proponents can be expected to seek an amendment to the federal Constitution making English the "official" language of the United States.

These efforts to legislate conformity will only increase the divisions within our society. The immediate impact will be to disfranchise voters and disadvantage language minorities. Racial and cultural animosity will be heightened as individuals find their prejudice sanctioned by law. In the long run, the Official English movement will lead to greater economic and social stratification. The Voting Rights Act must now be enforced to uphold the democratic rights of language minority citizens and reinstall the values fostered during the civil rights era.

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82. 1910 COLO. SESS. LAWS 1, 11-12.

83. Indeed, the struggle for women's suffrage was just beginning and continued until passage of the nineteenth amendment in 1920.

84. CALIFA, *supra* note 1, at 18 n.81.

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