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NOTE

USING PRINCIPLES OF INTERNATIONAL LAW TO RESHAPE AMERICAN LEGISLATION OF STATE OFFICIAL ENGLISH LAWS

Jenning Kohlberger

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. Perhaps 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,—a desirable end cannot be promoted by prohibited means.1

I. INTRODUCTION

To the surprise of two out of three Americans, English is not the official language of the United States.2 Cognizant of the bond between language and religious and cultural freedoms, the Framers of the Constitution chose not to designate an official state language so that no restriction on these freedoms might be implied.3 Thus, the United States Constitution does not provide for an official language.4

Yet today, without an official language decree, ninety-eight percent of our residents speak English well or very well.5 The United States is a nation that is predominantly monolingual.6 Still, a movement to formalize

6. BARON, supra note 4, at 192-93.
English as the official language has simmered for over two hundred years. It is esti-
mated that this population may increase to twelve percent by 2010. The mere pronouncement of English as the official language of the state does not violate the Constitution. For the government to craft classifications based on language is not necessarily unfavorable. In the past, the United States Supreme Court has ruled that individuals have language rights in several contexts, including the right to converse in any language, the right to language outside of the workplace, the right to waive legal privileges in one’s language, and the right to language at the voting booth. But for the government to formally advance the English language by requiring that all government-related matters be conducted in the official state language remains disputed. As the number of states amending their state constitutions to include Official English legislation grows, courts are attempting to de-

7. Id. at xiii.
8. Knapp, supra note 5, at 758.
9. Id.
11. Id.
12. Id. at 134.
20. Wong, supra note 17.
cide if such legislation is constitutionally valid. At the heart of the debate is to what extent the government should protect the rights of language minorities.

Within the scope of regulations and certifications promulgated by state administrative agencies, this paper seeks to identify the problem that courts face today in determining the range of linguistic rights. Part I examines the justifications for an Official English policy. Part II reviews the contexts in which language rights have been established in the past. Part III assesses the untidy area of language rights in cases involving social service and administrative agencies. Part IV looks to an Irish model, comparing its judicial approach as well as its legislature's acts, for a solution to our domestic problem. Lastly, Part V maintains that for language rights to be acknowledged and honored, state legislatures may find guidance in the Irish paradigm.

II. JUSTIFICATIONS FOR OFFICIAL ENGLISH

Most recently, a small group of activists twenty years ago sought to promote English as the official language by forming the single-issue group, U.S. English. As of 1995, its membership had expanded to 450,000. It, along with several subsequent English-advocacy groups, has pursued legislation that would add to the U.S. Constitution an English Language Amendment that would declare English as the official language of the country. Given that an amendment to the federal constitution would require a two-thirds majority in both houses of Congress and ratification by three-fourths of state legislatures, the likelihood such an amendment would pass is dubious. At the state level, however, amending a state constitution demands overcoming fewer and less complicated barriers. As a result, half of the country carries Official English laws in their constitutions.

Proponents of Official English laws in these states justify the amendment on several levels. Groups like U.S. English begin by first recognizing that the citizens of the United States are "remarkably diverse in ori-
gin, race, lifestyle, ethnicity, religion, and culture."\(^{29}\) However, they perceive a society that is multilingual as disordered.\(^{30}\) By adopting an Official English policy, society could become disciplined and unified.\(^{31}\) Since advocates of official English believe that the responsibility of government is to advance the common good, they seek to unify the country by advancing English as the official language.\(^{32}\) Such a proclamation would promote "social, political, and economic advancement; equality of opportunity for all; full participation in the democratic process by informed voters; economic efficiency and strength; [and] shared values and [make] national culture accessible to all."\(^{33}\) Moreover, such a policy would compel assimilation into American culture.\(^{34}\) The English language, proponents maintain, is an expression of the liberty principles upon which the American society was founded;\(^{35}\) that is, to not learn English is a threat to the democracy in which we live.\(^{36}\)

In the public sector, proponents contend that an Official English policy would be economical for courts, administrative agencies and public education.\(^{37}\) In the courtroom, interpreters would no longer be one of the state’s costs, nor would publishing documents in any other languages.\(^{38}\) Administrative agencies would no longer bear the expenses of recognizing non-English speakers and accommodating them in order to use government programs.\(^{39}\) Lastly, bilingual education could be reduced or eliminated since proponents assert that it is "wasteful government spending."\(^{40}\)

At the private sector level, consumers might be more comfortable understanding all that was communicated in their presence if businesses were required to obey an English-only law.\(^{41}\)

Fortunately for linguistic minorities, groups such as The English Plus Information Clearinghouse have countered the U.S. English movement since 1987.\(^{42}\) Highlighting the fact that the power of the United States lies in its

\(^{29}\) TATALOVICH, supra note 24, at 11 (citing U.S. English, U.S. English: Towards a Unified America (Washington, D.C., n.d.)).

\(^{30}\) BARON, supra note 4, at 27-28.

\(^{31}\) Id.


\(^{34}\) BARON, supra note 4, at 27-28.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) PIATT, supra note 19, at 150.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) DiChiara, supra note 32.

\(^{41}\) PIATT, supra note 19, at 150.

\(^{42}\) TATALOVICH, supra note 24, at 16-17.
diversity, opponents to Official English relish the "unique reservoir of understanding and talent" within the diversity of the American population.\textsuperscript{43} Rather than establishing one official language, they seek to preserve cultural pluralism.\textsuperscript{44} Such pluralism, they declare, can only serve to boost competitiveness and the United States' position of international hegemony.\textsuperscript{45} Conversely, a country that remains monolingual in the global community may be at a marked disadvantage.\textsuperscript{46}

Overall, neither proponent nor opponent has won the battle. But as states continue to pass Official English laws, the need to look at the rights of linguistic minorities intensifies. Let us now turn to areas in which the right to language has been recognized.

III. ESTABLISHED LINGUISTIC RIGHTS

A. Linguistic Rights in the Courtroom: The Right to An Interpreter

The constitutional right to an interpreter in a civil or criminal case has not yet been addressed by the United States Supreme Court.\textsuperscript{47} In civil cases, the right to an interpreter remains unrecognized.\textsuperscript{48} Although litigants may opt to individually pay for the use of an interpreter, courts have not found any basis for assigning them to defendants.\textsuperscript{49} Fortunately, in criminal cases, decisions by lower courts, the Court Interpreters Act, and state agencies have established the constitutional and statutory bases for such a privilege.\textsuperscript{50} Thus, the remainder of this section concerns only the right to an interpreter in criminal cases.

Until three decades ago, the trial court judge generally held the discretion to appoint a courtroom interpreter in criminal proceedings.\textsuperscript{51} Then in 1970, a constitutional basis for an interpreter was found by the United States Court of Appeals for the Second Circuit in \textit{U.S. ex rel. Negron v. New York}.\textsuperscript{52}

In \textit{Negron}, the defendant was a twenty-three year old Puertan Rican immigrant who worked in the U.S. as a potato packer.\textsuperscript{53} When one of his

\textsuperscript{43}. \textit{Id.} at 17 (citing "Statement of Purpose, English Plus Information Clearinghouse," enclosure with form letter to “Dear Friend” from Mary Carol Combs, director, n.d.).
\textsuperscript{44}. \textit{Id.}
\textsuperscript{45}. \textit{Id.}
\textsuperscript{46}. Knapp, \textit{supra} note 5, at 787.
\textsuperscript{47}. PIATT, \textit{supra} note 19, at 80.
\textsuperscript{48}. \textit{Id.}
\textsuperscript{49}. \textit{Id.}
\textsuperscript{50}. \textit{Id.} at 83.
\textsuperscript{51}. \textit{Id.} E.g., Perovich v. United States, 205 U.S. 86, 91 (1907).
\textsuperscript{53}. \textit{Id.} at 387-88.
house-mates was fatally stabbed, Negron was charged with murder.\footnote{54} He possessed only a sixth-grade education and spoke only Spanish, with no comprehension of English.\footnote{55} At trial, his court-appointed attorney, the trial judge and the witnesses against him did not speak any Spanish.\footnote{56} Moreover, he never received a translation of the testimony against him even though an interpreter was present during the four-day trial.\footnote{57} Thus, on appeal, he claimed that his right under the Confrontation Clause of the Sixth Amendment had been violated.\footnote{58}

Recognizing that the holding would have great precedential value, the court not only found a violation of Negron's rights but also explicitly set out its reasons.\footnote{59} To begin, the trial was unconstitutional for lack of adequate translation.\footnote{60} Clearly the Sixth Amendment, which guaranteed the right to be confronted with adverse witnesses and made applicable through the Fourteenth Amendment, had been violated.\footnote{61} The court then listed other factors that forbade such a trial—fairness, the reliability of the fact-finding process, the force of our adversary system, and adequate communication between a criminal defendant and his lawyer.\footnote{62} In sum, the court pronounced that “the least [it could] require is that a court, put on notice of a defendant’s severe language difficulty, make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense.”\footnote{63} Without this assistance, the defendant would face a “trial” like Negron’s, one that was merely “a babble of voices.”\footnote{64}

The decision in Negron spurred forth the enactment of the Court Interpreters Act passed eight years later.\footnote{55} Under its provisions, a district court judge is required to use an interpreter in criminal or civil cases brought by the United States.\footnote{66} If a party or witness is only or primarily fluent in a non-English language, suffers from a hearing impairment that hampers communication or comprehension of the trial, or hinders understanding of testimony, an interpreter must be assigned to the case.\footnote{67} Interpreters are chosen from a list determined by the Director of the Administrative Office of the United

\footnote{54. \textit{Id.} at 387.} \footnote{55. \textit{Id.} at 388.} \footnote{56. \textit{Id.}} \footnote{57. \textit{Id.}} \footnote{58. Negron, 434 F.2d at 389.} \footnote{59. \textit{Id.} at 387.} \footnote{60. \textit{Id.}} \footnote{61. \textit{Id.} at 389.} \footnote{62. \textit{Id.}} \footnote{63. \textit{Id.} at 390-91.} \footnote{64. Negron, 434 F.2d at 388.} \footnote{65. PIATT, supra note 19, at 82.} \footnote{66. 28 U.S.C. § 1827(c)(2) (2000).} \footnote{67. 28 U.S.C. § 1827(b)(1).}
States Courts. At the state level, statutes provide even broader rights to an interpreter than the Court Interpreters Act.

Overall, the right to an interpreter in the courtroom today has principally been established. While the right to an interpreter is no longer at the discretion of the trial judge, he still retains control over whether a party is entitled to an interpreter and how the interpreter is utilized during trial.

B. Linguistic Rights in Education

Because of the continuous influx of immigrants, the education system in the United States has traditionally incorporated bilingual instruction into its curriculum. Yet the right to a bilingual education, particularly significant for non-anglophone children, is not protected by the Constitution. In 1923, however, the Supreme Court recognized a critical right to education in *Meyer v. Nebraska*. Moreover, several federal and state statutes have been enacted to bolster these rights.

In the nineteenth century, communities that held sufficiently large immigrant populations could gather sufficient political pressure to insist upon the preservation of their native culture and language. It was commonly thought that safeguarding native languages "would tend to soften the abrupt transition from foreign to American ideas and ways to thought, and to obviate the breakdown in parental control and discipline often observed in immigrant families." As a result, most public schools taught in English as well as the dominant language of immigrants. Students learned English concurrent with German, French or Dutch.

When World War I erupted, however, nativist sentiments drove the notion that immigrants ought to "Americanize" by learning to speak English. States began to pass laws to encourage "Americanization," requiring immigrants to attend compulsory language classes. By 1921, twenty states had enacted such statutes. Among the laws passed was Chapter 249 of the

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68. 28 U.S.C. § 1827(b)(3).
69. PIATT, supra note 19, at 82. See id. at 82-83 for various state applications.
70. Id. at 83.
72. 262 U.S. 390 (1923).
73. See infra Part II.B(3).
74. Zabetakis, supra note 71, at 107.
76. Zabetakis, supra note 71, at 107.
77. Id.
78. BARON, supra note 4, at 136.
79. See id. at 136-37.
80. Id. at 137.
Nebraska Sessions Laws of 1919 which proscribed the teaching of foreign languages to students before they finished the eighth grade. A challenge to the constitutionality of this statute would compel the Supreme Court to address the rights of parents to direct the education of their children.

1. **Meyer v. Nebraska:**

On May 25, 1920, Robert T. Meyer taught German to a ten-year old student named Raymond Parpart at the Zion Parochial School in Hamilton county, Nebraska. Meyer was found guilty of violating Chapter 249 of the Nebraska Sessions Laws of 1919. The statute precluded him from teaching a student who had not completed his eighth grade education in any other language than English. As a result, Meyer was fined twenty-five dollars.

Meyer proffered two defenses when he appeared before the Nebraska Supreme Court. First, he argued that he was not teaching during school hours. Second, he maintained that the statute unlawfully obstructed with his right to choose and pursue a profession as well as the parents' right to determine what their children would be taught.

The Nebraska Supreme Court rejected Meyer's defenses and affirmed the lower courts' conviction. Its concurrence with the legislature's resolution is a reflection of this "Americanization" period. In finding that the statute was validly enacted under the state police power, the court re-

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81. The statute provided that:

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Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense.

Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.
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*But see John J. Mahoney, *Training Teachers for Americanization, in U.S. BUREAU OF EDUCATION BULLETIN NO. 12, at 15 (Government Printing Office, 1920) (advising that language teachers should not exaggerate the effects of war hysteria).*

82. 262 U.S. 390 (1923).
83. *Id.* at 396.
84. *Id.* at 397.
85. *Id.*
87. *Id.* at 100.
88. *Id.* at 103-104.
89. *Id.* at 101.
90. *Id.* at 104.
marked that the purpose of the statute was apparent. It noted the “baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety.” The court further observed that children taught in the language of their immigrant parents would “educate them so that they [would] always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.”

The United States Supreme Court overturned Meyer’s conviction on appeal. Finding the Nebraska statute arbitrary and with no reasonable relation to any legitimate end, the Court declared it unconstitutional. Its reasoning plays a pivotal role in the educational arena.

To begin, the Court acknowledged that the notion of liberty was not clearly delineated. It did state, though, that liberty certainly included not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It then noted that education and the acquisition of knowledge have always been regarded as “matters of supreme importance” by Americans. What Meyer did was merely part of his occupation as a teacher in furtherance of those very goals. The Court first concluded that Meyer had a right to teach. Furthermore, the Court held that the parents had the right to instruct Meyer on how to teach their children. These two rights were “within the liberty of the [Fourteenth] Amendment.”

Secondly, the Court observed that certain fundamental rights belonged to all individuals. In particular, the Court noted that the Constitu-

91. Id. at 102.
93. Id.
95. Id. at 399.
96. Id.
97. Id. at 400.
98. Id.
99. Id.
100. Meyer v. Nebraska, 262 U.S. at 403.
101. Id. at 401.
tion afforded protection "to all, to those who speak other languages as well as to those born with English on the tongue."\textsuperscript{102}

The Meyer decision effectively established both a right of teachers to instruct and a right of parents to determine what their children would learn. However, the Court did not reach the questions of an official-English policy or of educating non-anglophones. In 1973, the Supreme Court would once again encounter the issue of language rights, and this time, the Court would face the right to language in the classroom.

2. \textit{Lau v. Nichols}:\textsuperscript{103} Right to a Meaningful Opportunity to Participate in Education

In 1973, the California Education Code mandated that all children between the ages of six and sixteen years had to attend school, and that to graduate from grade twelve, the student had to demonstrate proficiency in English.\textsuperscript{104} At that time, the San Francisco, California school system held nearly 3,000 Chinese students who spoke little or no English.\textsuperscript{105} Yet only approximately 1,000 of those students received supplemental English courses; nearly 2,000 students remained without any English-language instruction.\textsuperscript{106} Among these 2,000 students was Kinney Kinmon Lau.\textsuperscript{107} Suing on behalf of approximately 2,000 non-English-speaking Chinese students, Lau’s guardian claimed unequal educational opportunities.\textsuperscript{108} The complaint asserted that the San Francisco Unified School District violated the Equal Protection Clause of the Fourteenth Amendment and § 601 of the Civil Rights Act of 1964.\textsuperscript{109}

The Supreme Court held that the school district had violated the rights of the non-English speaking Chinese students.\textsuperscript{110} The Court first observed that mere equality in school facilities was insufficient to produce fair classroom experiences.\textsuperscript{111} For the students who understood little or no English, any effective participation in the educational program was barred.\textsuperscript{112} The Court recognized that California’s policy in fact prevented the students

\textsuperscript{102} Id.
\textsuperscript{103} 414 U.S. 563 (1974).
\textsuperscript{104} Id. at 566.
\textsuperscript{105} Id. at 564, n.1.
\textsuperscript{106} Id. at 564.
\textsuperscript{107} BARON, supra note 4, at 171.
\textsuperscript{108} Lau, 414 U.S. at 564.
\textsuperscript{109} Id. at 565.
\textsuperscript{110} Id. at 566.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
from having a meaningful education; the lack of supplemental education made a "mockery of public education." Thus, the Court rested its decision only on § 601 of the Civil Rights Act, not on the Equal Protection Clause claim.

While Lau did not plainly state that bilingual students have a right to bilingual education, it did present a yardstick for a "meaningful" education. For this reason, it has often been alluded to as the case that compelled bilingual education. Yet the Lau decision offered no particular method of providing bilingual education. The Court only curbed the district's "sink or swim" system to instructing children who had little English proficiency.

3. Statutory Protection

Following World War II, a remarkable upsurge of Spanish-speaking children entered public schools. By the 1960s, numerous groups pushed for federal legislation to preserve the culture of these children while serving their educational needs in English and Spanish. As a result, federal and state legislators enacted statutes that provided for non-anglophonic children.

The Bilingual Education Act of 1968 conferred grants to encourage research to determine how to best assist children who had little or no proficiency with English. Two years later, the Health, Education and Welfare Department endorsed a regulation under Title VI of the Civil Rights Act of 1964 that further protected linguistic rights in the classroom. The directive provided that a school district "must take affirmative steps to rectify the language deficiency in order to open its instructional program" to students who were excluded from effective participation because of their national origin.

Following Lau, Congress codified the decision in its enactment of the Equal Educational Opportunities Act of 1974, but it is imprecise in its

113. Id.
114. Lau, 414 U.S. at 566.
115. Id. Section 601 prohibits any discrimination founded upon "the ground of race, color or national origin [in] any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, 42 U.S.C. § 2000d.
117. Lau, 414 U.S. at 569 (although the Court indicated that the school district could choose to teach English to the students or to teach the students in Chinese).
118. Id.
119. PIATT, supra note 19, at 42.
120. Id.
122. PIATT, supra note 19, at 43.
recommendations.\textsuperscript{124} The legislation mandates that schools take "appropriate action" to meet the linguistic needs of students.\textsuperscript{125} As a result, schools have had little indication as to how best to educate their non-English speaking students.\textsuperscript{126} While language teaching techniques have advanced in the past few decades, no method has proven to be accommodating.\textsuperscript{127}

At the state level, by 1990, twenty-three states had enacted bilingual educational statutes.\textsuperscript{128}

Today, the critical right of minority language students to receive bilingual education has been reasonably established.\textsuperscript{129} The debate no longer focuses on whether a right to bilingual education exists, but the extent to which it does;\textsuperscript{130} that is, the discussion now looks to whether education should aim for assimilation or for pluralism.\textsuperscript{131}

IV. LINGUISTIC RIGHTS, SOCIAL SERVICES & ADMINISTRATIVE AGENCIES

Language rights in the arena of social services and administrative agencies have typically been treated as one field of study by academics.\textsuperscript{132} Yet, unlike the matters of courtroom proceedings and education,\textsuperscript{133} the case law in this area appears erratic—sometimes acknowledging a right to language, other times upholding a regulation despite language discrimination.\textsuperscript{134}

\begin{footnotesize}
\begin{enumerate}
\item Zabetakis, supra note 71, at 108.
\item 20 U.S.C. § 1703(f) (stating that "no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in instructional programs.").
\item Zabetakis, supra note 71, at 108.
\item BARON, supra note 4, at 174. See Zabetakis, supra note 71, at 109 (describing seven pedagogical approaches to bilingual education).
\item PIATT, supra note 19, at 56-57 (noting that Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin had passed such legislation).
\item Id. at 49.
\item Id.
\item Zabetakis, supra note 71, at 109 (citing Terri Lynn Newman, Comment, Proposal: Bilingual Education Guidelines for the Courts and Schools, 33 EMORY L.J. 577, 580 (1984)). See PIATT, supra note 19, at 49.
\item See, e.g., PIATT, supra note 19, at 97-111; Brian L. Porto, Annotation, "English Only" Requirement for Conduct of Public Affairs, 94 A.L.R. 5th 537 (2001); Rodriguez, supra note 10, at 216-20.
\item See supra Part II.A-B.
\item Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (holding no right to interpreters before the state's Department of Human Resources Development in order to attain unemployment insurance benefits); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (holding no right to interpretation in order to take an examination for appointment as a carpenter); Guerrero v. Carlson, 512 P.2d 833 (Cal. 1973) (finding no right to notification in Spanish when the state intended to terminate or reduce welfare benefits); Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998) (finding the state's "English-only" policy in government business violated the First Amendment and Equal Protection); Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds sub nom. Alexander v. Sandoval, 532 U.S. 275 (2001) (finding the state's "English-Only" policy unconstitutionally discriminatory against non-English-speaking applicants who failed to pass a driver's examination); Soberal-Perez v. Heckler, 465 U.S. 929 (1984) (finding discrimination by language, but no right to interpretive assistance before a Social Security program).
\end{enumerate}
\end{footnotesize}
Upon inspection, cases that have involved social services like welfare or unemployment benefits have not yet established a right to an interpreter.\textsuperscript{135} In spite of that, cases that have concerned administrative agencies have fared more favorably, if not consistently.\textsuperscript{136} It is my contention that these cases are not in fact one category called "public affairs,"\textsuperscript{137} but constitute distinct subjects warranting separate review.

\textit{A. Social Services}

Under this split analysis, the trend of denying interpretive assistance in social services appears reasoned. Social services like welfare and unemployment benefits are granted by the state legislature. It is the legislature that fixes the conditions under which a person qualifies for the benefits.\textsuperscript{138} This power is only limited by constitutional guarantees such as procedural due process, and only when the state has chosen to reduce or terminate benefits.\textsuperscript{139} Giving due respect to state legislatures, courts no longer "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."\textsuperscript{140} Any procedure that is rationally-based and is free of invidious discrimination will likely be upheld, despite the Supreme Court's acknowledgement that the management of public welfare assistance concerns the "most basic economic needs of impoverished human beings."\textsuperscript{141} As a result, courts have consistently been unwilling to set the terms of assistance by implying a right to language assistance.\textsuperscript{142} Their reluctance reflects the philosophy that the benefits of social services are grants, not entitlements, from the state.

\textit{B. Administrative Agencies}

At the same time, the twofold inquiry leads to a better understanding of language rights in administrative agency cases. A cursory study of the police power may help to illuminate why courts today are wrangling with language rights in matters of administrative agencies.

\textsuperscript{135} E.g., Carmona, 475 F.2d 738; Guerrero, 512 P.2d 833; Soberal-Perez, 466 U.S. 929.
\textsuperscript{136} E.g., Frontera, 522 F.2d 1215; Sandoval, 197 F.3d 484.
\textsuperscript{137} But see Porto, supra note 132.
\textsuperscript{141} Dandridge, 397 U.S. at 485-87. See also Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (explaining that the provision English-only notices for unemployment benefits are a reasonable approach).
State governments alone possess the police power. Unlike the federal government, which depends upon the Constitution for its enumerated powers, a state government may enact any legislation under its broad police power, subject to the protections of the Constitution. In 1887, the Supreme Court explained in Mugler v. Kansas that for legislation to be valid under the police power, the statute need only to purport "to have been enacted to protect the public health, public morals, or the public safety, [to have] no real or substantial relation to those objects, or [be] a palpable invasion of rights secured by the fundamental law." Since then, legislation has been held to a rational basis standard.

Under the rational basis test, the government holds a legitimate purpose if the regulation promotes a traditional "police" purpose like protecting safety, public health, or public morals. Furthermore, the regulation should reasonably fit the purported purpose. To be held invalid, the statute would need to be "clearly wrong, a display of arbitrary power, [and] not an exercise of judgment." Consequently, the Supreme Court has seldom found a law invalid under this test. Yet, unlike the power to bestow social services, the police power is limited by its purpose; however, to effectively balance the state's need to protect public welfare against the individual interests, courts may require legislative instruments to effect justice.

With the police power defined, let us now turn to the case law in the area of linguistic rights in the context of administrative agencies executing the police power. The Supreme Court has yet to address such a right; as a result, we will examine cases that have been reviewed by circuit courts. As we shall see, the area lacks a seminal case like Negron in the courtroom context and Meyer and Lau in education.

1. Frontera v. Sindell: No Right to Language

Frontera, a native of Puerto Rico who moved to Ohio when he was twenty eight years old, served as a carpenter for the Cleveland Hopkins Airport under temporary appointment. When the Civil Service Commission
of the City of Cleveland announced that it would hold examinations for the
skilled crafts, Frontera sought to have both the written and oral sections of
the examination for carpenter permanent appointment translated into Span-
ish.153 Despite the Commission’s assurances, a Civil Service employee
failed to translate the test and Frontera was forced to take the examination in
English.154 Unfortunately, Frontera failed the examination; as a result, he
did not receive the certification.155 He subsequently filed a class action suit
against the Civil Service Commission of the City of Cleveland and the
Commissioner of Airports.156 Claiming that his rights under the Fourteenth
Amendment and 42 U.S.C. §§ 1981, 1983 and 1985 had been violated, he
asked the court for damages and injunctive relief.157

The District Court held that the Commission had a right to conduct
the examination in only English under the “compelling interest” test.158
While the court acknowledged that there was a discriminatory effect on the
Spanish-speaking population of the city,159 it noted that the state had met its
burden of establishing a “compelling interest” to justify its procedure.160 On
appeal, the Sixth Circuit affirmed the lower court’s decision, but remarked
that the court should have employed an even lower standard of review, the
rational basis test, because the case did not involve a suspect nationality or
race.161

The Civil Service Commission’s purported interest in administering
the test in English was to maintain the successful operation of the Civil Ser-
vice system.162 The Sixth Circuit agreed.163 The Commission further as-
serted that an English-only examination would effectively eliminate incom-
petent carpenters.164 With this the court also agreed.165 While the court
agreed with the state’s assertion, it also recognized that there was a lack of
training for carpenters, and still expected that in the course of experience,
applicants would have mastered the proper terminology.166 It held that “[a]t
the very least, use of such terminology would not ordinarily interfere with

153. Id. at 1216-17.
154. Id. at 1217.
155. Id. at 1216.
156. Id.
157. Frontera, 522 F.2d at 1216.
158. Id.
159. Id. at 1217-18 (finding that not one of the city’s 574 craft positions was held by the city’s 545 Span-
ish-speaking craftsmen).
160. Id. at 1218.
161. Id. at 1219.
162. Id.
163. Frontera, 522 F.2d at 1219.
164. Id.
165. Id.
166. Id.
the test's objective of identifying competent carpenters and ranking them for Civil Service." And even if the test did not match its purpose well, there remained merit in holding civil service tests as a general matter.

[A] test, even one the cutoff of which does not demonstrably predict job performance, may serve worthwhile goals in gross by sifting from the pool of potential applicants those without enough motivation even to try to acquire the skills the test demands, and by discarding some few candidates who take the test but whose mental ability is so low that they are obviously unsuitable. Finally, it is virtually impossible for an employer to justify to a mathematical certainty every selection.

In sum, the court held the administration of an English-only examination to a rational basis standard. It found a legitimate purpose, and a reasonable fit between the English-only examination and the state's purpose of maintaining a successful Civil Service system and ascertaining competent carpenters. Yet, what is troublesome is the court's callous disregard for those who might have been competent for the certification but failed because of the language of the examination.

The Fourteenth Amendment provides that no "state [shall] deprive any person of life, liberty or property, without due process of law." In 1897, the Supreme Court construed the liberty of this amendment to "embrace the right of citizen[s] to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation . . . ." Furthermore,

[while the Court] has not attempted to define with exactness the liberty . . . the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes . . . the right of the individual . . . to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

167. Id.
168. Id. at 1218-19.
169. Frontera, 522 F.2d at 1219 (citing Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1022 (1st Cir. 1974)).
In the *Frontera* case, the plaintiff sought to pursue his livelihood of carpentry. He endeavored to labor as a carpenter with permanent appointment. He prepared to take the examination that was required for the appointment. His quest, however, was thwarted by the rules of the Commission that bestowed the certification. Its English-only administration of the examination precluded Frontera from satisfying the examination. One must question, then, whether the Commission’s English-only rule was valid under the police power. That is, one must query whether the rule was adopted to protect the public health or safety or if it was a display of arbitrary power and not an application of judgment.

On the one hand, the Commission sought to identify competent craftsmen. It deemed the terminology of carpentry necessary to the trade, terms such as “beading work” or “factory or shop lumber.” Since such terms could only be learned through experience, the Commission presumed that such vocabulary testing would distinguish the experienced, competent carpenters from the applicant group. If the knowledge of carpentry-related vocabulary were indeed correlated to the aptitude of the carpenter, then the English-only administration of the test seems sensible. The English-only rule ensured that the Commission would appoint only carpenters who would adequately serve public health and safety. Therefore, the rule validly existed under the state police power and Frontera was fairly denied certification.

On the other hand, the courts acknowledged that Frontera was a carpenter with “substantial skill.” He was a member of the Carpenter’s Union local based on an oral test and an inspection of his carpentry work. He had previously been employed as a carpenter under temporary appointment, and had understood the work orders, blueprints, verbal instructions, and sketches of his post. In sum, he had “competently performed his job.” One might argue that the English examination did not test his craftsmanship, skill or competency. Had the test been translated into Spanish, it is feasible that Frontera could have passed the test. What disqualified him, then, from being certified as a carpenter permanent appointment was the language of the examination. Furthermore, one might say that the Commission’s choice to administer the test in English was not an exercise of judgment. Its policy resulted in English-speaking, not competent, carpenters. The Commission’s policy was merely a display of power; it provided the test as it did because it

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173. *Frontera*, 522 F.2d at 1217.
174. Id. at 1216.
175. Id.
176. Id.
177. Id.
held the authority. As a result, one could conclude that the English-only administration was an invalid exercise of the police power.

It appears, though, that English was necessary to the execution of the job. While the circuit court's opinion did not specify the responsibilities a carpenter permanent appointment held, the position was one of the highest paid posts in the city. It is realistic to expect that such a position would require the use of English in everyday affairs to be efficient and effective. The Sixth Circuit observed that the examination did not require any verbal ability that was outside the scope of carpentry. That is, the test did not require a general proficiency in the English language. In sum, "the test was job related." Thus, the administration of the test in English only, under the rational basis test, was a fair application of the police power.

The question, then, is whether an administrative agency may administer a test in English only when English is not vital to the post. We now turn to Sandoval v. Hagan to examine whether a state's English-only policy which dictated that a driver's license examination be given in English only was a fair use of the state police power.

2. Sandoval v. Hagan: Right to Language?

On July 13, 1990, the state of Alabama adopted an English-only amendment to its constitution. Amendment 509 declares English as the official language of the state. One year later, the Department of Public Safety enacted an English-only policy pursuant to Amendment 509: All driver's license examinations would be conducted in English. Martha

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178. Id.
179. *Frontera*, 522 F.2d at 1217.
180. Id. at 1218.
181. Id. at 1220.
183. Id. at 487-88.
184. Id. Amendment 509 proclaims:

> English is the official language of the state of Alabama. The legislature shall enforce this amendment by appropriate legislation. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

> Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

> Id. at 488.
185. Id. at 488.
Sandoval challenged this policy in 1996.\textsuperscript{186} A permanent resident alien from Mexico, Sandoval spoke and understood very little English, and could not read English well.\textsuperscript{187} In a class action suit, she claimed that the Department’s practice amounted to discrimination based on national origin under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, and violated the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. §§ 1981 and 1983.\textsuperscript{188} She sought a declaratory judgment for unlawful and unconstitutional practice and a permanent injunction of the English-only testing.\textsuperscript{189}

The district court granted the injunction.\textsuperscript{190} It found that the Department had intentionally discriminated against applicants based on national origin and ordered the Department to “fashion proposed policies and practices for the accommodation of Alabama’s non-English-speaking residents who seek Alabama driver’s licenses.”\textsuperscript{191} While the Department’s policy was an exercise of police power and might have been reviewed under the rational basis test, because the claim had asserted a violation of equal protection, the district court held the policy to a higher standard.\textsuperscript{192}

The State proffered six justifications for its English-only driver’s license examinations: “(1) Amendment 509’s requirement, (2) highway safety concerns, (3) administrative accommodation concerns, (4) exam integrity concerns, (5) funding concerns, and (6) English is the official language of the United States.”\textsuperscript{193} The court generally rejected the State’s justifications, finding that none were “substantial legitimate justifications” for the discrimination.\textsuperscript{194} Neither the Eleventh Circuit nor the appellants disputed the district court’s findings.\textsuperscript{195}

The State failed to prove its assertion that non-English-speaking drivers were more dangerous because they lacked fluency in English.\textsuperscript{196} In fact, the Chief of the Department Driver’s License Division from 1978 to 1987 testified that he saw no such correlation during his tenure.\textsuperscript{197} Moreover, the State defeated its rationale by recognizing the licenses of non-

\textsuperscript{186} Id.
\textsuperscript{187} Id. at 490.
\textsuperscript{188} Sandoval II, 197 F.3d at 487.
\textsuperscript{189} Id. at 488.
\textsuperscript{190} Sandoval v. Hagan, 7 F. Supp. 2d. 1234, 1315 (M.D. Ala. 1998).
\textsuperscript{191} Sandova II, 197 F.3d at 489.
\textsuperscript{192} Id. at 510.
\textsuperscript{193} Id. at 490.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 490-91.
\textsuperscript{197} Sandoval II, 197 F.3d at 490.
English-speaking drivers from other states. The Department also made special accommodations for groups like the illiterate, deaf, and disabled that "might pose theoretically greater safety risks."  

The court also found the concerns for examination integrity "meritless." For more than ten years, from the 1970s to 1991, the Department had offered the examination in fourteen foreign languages, "including Spanish, Korean, Farsi, Cambodian, German, Laotian, Greek, Arabic, French, Japanese, Polish, Thai, and Vietnamese." No difficulty had arisen from the multi-lingual administration of the driver’s license exam.  

Lastly, the district court discarded the notion that the Department could not stay within its budget if it accommodated non-English-speaking applicants. Before the enactment of Amendment 509, the Department had acquired its translations of the examination by using volunteer translators. It had cost the State nothing to obtain the examinations, and it did not appear to cost the State anything to use them again. Furthermore, even if the Department were constrained by its budget, the court remarked that applicants ought to have been permitted the option of providing for their own translators.  

In sum, Sandoval sought to be licensed as a Class D driver in Alabama. Her pursuit was frustrated, however, by the State and Department’s adoption of an English-only policy. Pursuant to the guarantees of the Fourteenth Amendment, the district and circuit courts recognized that the Department’s practice was unconstitutional. The administration of the examination in English only was held to violate the Equal Protection Clause for discrimination. Yet the significance of this case should not be overstated.  

While Sandoval did hold that an English-only policy was unconstitutional, it did not vindicate the right to minority languages. The circuit court simply found that the impact of the rule was so heavily visited upon a suspect classification of national origin that it violated the equal protection of the law. It conceded that the Supreme Court has never held that language might act as a proxy for national origin protection in equal protection claims and that "existent case law [is] unclear" on the matter. Thus, while the
outcome was dissimilar to that of *Frontera*, *Sandoval* resembles *Frontera* in spirit: neither case found a constitutional right to a minority language in an administrative agency context.

One should note, though, the different correlations between language and licensed skill in the two cases. In *Frontera*, the link appeared reasonable. It was sensible that to be qualified for one of the city’s highest paid positions, an applicant ought to be able to understand the terms of the carpentry and to be proficient in the English language. A successful applicant would in part be proving his qualification for the occupation by taking the examination in English. The facts of *Sandoval* hardly seem analogous. The correlation between language proficiency and the ability to drive safely seems tenuous at best.

Consider that states administer driver’s license examinations to ensure that safe drivers operate vehicles. Driving, after all, requires little more than an elementary grasp of how to operate a car safely. Traffic signs are erected to be identifiable by their words, shape, and color. For example, drivers understand a “STOP” sign by its printed word, the octagonal shape of the sign, and the sign’s red background and a white border. That is to say, an applicant need not be able to read English to drive safely. Requiring non-English-speaking applicants to take the test in English is in essence requiring them to prove their qualification for driving by demonstrating their ability to read English. The fact that Alabama permitted illiterate persons to become licensed drivers underscores how superfluous it is to administer the test in English only. Unlike *Frontera*, non-English-speaking applicants are precluded from being licensed when the language of the examination is largely unrelated to the licensed activity.

That one can become licensed in a skill by examination currently does not translate into access to the examination in a language of choice, regardless of how pertinent knowledge of the English language may be. The effect of the resulting practices of administrative agencies may be considerable. In Alabama alone, it was estimated that nearly 13,000 adult residents “would have difficulty in obtaining an Alabama driver’s license because of the Department’s English-only policy” in 1998.209 As of April 2000, half of the country had adopted English-only laws.210

If, in the future, the English-only policies of other states are not found to violate the Equal Protection Clause, and their subsequent licensing regulations are reviewed as an exercise of the state police power under a

209. Id. at 489.
rational basis test, it is my forecast that other courts will join in the judgments of the Sixth and Eleventh Circuits. That is, courts will defer to the state's legislated English-only policy. Applicants who seek licenses that do not require English fluency, but are forced to take the English-only tests, will be barred from the activity.

If the courts cannot protect this non-English-speaking population, these potential applicants may be prohibited from any licensed activity unless a remedy is provided for by the state legislatures. Since this is an emerging area of law within the United States, it may be prudent to look beyond our borders at other countries that boast multi-lingual societies. It may be instructional to examine how countries like Ireland, with dual official languages, conduct administrative certification procedures that balance the state's promotion of official languages and the applicant's linguistic qualifications for the certification.

V. LOOKING TO AN IRISH MODEL

Article 8 of the Irish Constitution (Bunreacht na hEireann) declares the official languages of the country:

1. The Irish language as the national language is the first official language.
2. The English language is recognized as a second official language.

While a minority of the population speaks Irish fluently, the government of Ireland has continually preserved and promoted the use of Irish as a mark of national identity since the 1950s. In 1979, the Minister of Education disseminated a regulation that was consistent with the country's policy of promoting Irish. Circular Letter no. 28/79 required that all permanent full-time teachers hold the Ceard-Teastas Gaeilge, a certificate of proficiency in Irish. The circular made special provisions for applicants from foreign countries and for appointees who had not obtained the certificate.

In 1982, Anita Groener, a Dutch national, served as an art teacher under temporary appointment at the College of Marketing and Design in

212. Id. at 405.
213. Id. at 405, 414.
214. Id. at 414.
215. Id. at 411.
216. Id. at 411-12.
Dublin, Ireland.\textsuperscript{217} She sought to be appointed as a permanent lecturer in art at the college two years later.\textsuperscript{218} While she passed the remainder of the application process, Groener failed to satisfy the linguistic requirement of Circular Letter 28/79.\textsuperscript{219} She was consequently not appointed.\textsuperscript{220} Thus, Groener filed a suit against the Irish Minister for Education and the City of Dublin Vocational Education Committee.\textsuperscript{221} She claimed that the regulations of the circular were in violation of Article 48 EEC and Regulation 1612/68.\textsuperscript{222}

Without reaching the question under Article 48 EEC, the Court of Justice of the European Communities reviewed the meaning of Article 3(1) of Regulation 1612/68 which established that administrative practices cannot be designed to exclude "nationals of member-States away from the employment offered."\textsuperscript{223} The Article provided an exception to the rule, though; the provision was not applicable to provisions "relating to linguistic knowledge required by reason of the nature of the post to be filled."\textsuperscript{224} The court ob-

\textsuperscript{217} Groener, 1 C.M.L.R. at 412.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 411-12.
\textsuperscript{220} Id. at 411.
\textsuperscript{221} Id. at 412.
\textsuperscript{222} Groener, 1 C.M.L.R. at 412. The treaty states that:
1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, Regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that state, subject to conditions which shall be embodied in implementing Regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.


1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:
   - where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals or
   - where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.
   This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

\textsuperscript{223} Groener, 1 C.M.L.R. at 413.
\textsuperscript{224} Id.
served that the teaching of art in public vocational education schools was primarily, if not wholly, held in English. 225 It even noted that knowledge of the Irish language did not appear necessary for the position of art lecturer. 226 While the finding seemed to lead to a result in favor of Groener, the court persevered in defining what constituted the "nature of the post to be filled." 227

Reviewing the import of Article 8, the court held that the Education Minister’s conditions listed in Circular Letter no. 28/79 were consistent with the public policy of endorsing the Irish language. 228 Teachers, performing an "essential role" in society, were deemed a critical intermediary to realize the public policy. 229 To impose upon them a requirement of knowledge of the Irish language was a logical means to achieve the state goal. 230 The court thus found the circular’s provisions “reasonable.” However, it conditioned its holding; 231 that is, the imposition on teachers was sound “provided that the level of knowledge required [was] not disproportionate in relation to the objective pursued . . . [and the knowledge of the language] be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled.” 232

In many ways, the facts of the Groener case parallel the circumstances of Frontera v. Sindell and Sandoval v. Hagan. 233 In both situations, the state boasted a multi-lingual society, but enjoyed an official language policy. The official language was not merely symbolic, but a policy genuinely pursued by the government. Moreover, agencies under the authority of the government had the power to implement regulations as they saw fit. In both cases, applicants did not hold the requisite knowledge to pass the examination. 234 Consequently, none of the applicants received the certification necessary for the appointment. 235 Yet between the starting point of an official language policy and the courts' conclusions lies the difference between the Frontera and Groener cases.

225. Id.
226. Id.
227. Id. at 413-14.
228. Groener, 1 C.M.L.R. at 414.
229. Id.
230. Id.
231. Id.
232. Id.
233. See supra Part III.B(1)-(2).
235. Groener, 1 C.M.L.R. at 411; Frontera, 522 F.2d at 1216.
Whereas the U.S. regulation was viewed as a valid exercise of the police power and reviewed under the rational basis test, the Irish regulation was viewed against a larger background. That is, the Sixth Circuit simply looked for a legitimate state purpose for its English-only administration, and, finding some rational fit between its English-only examination and the proffered purpose, held the English-only procedure valid.\textsuperscript{236} In contrast, the European court closely scrutinized the state purpose as well as the right of the applicant to express himself.\textsuperscript{237} The court balanced the importance of the state's official language with the applicant's right to language. Because the promotion of the Irish language was judged to be a prevailing public policy, after weighing both sides, the European court held that the circular's conditions were valid.\textsuperscript{238}

While the European court's balancing approach may provide an interesting model of judicial thought for American academics to muse, it is of limited applicability in the United States because of customary standards of review in American courts. Moreover, given the established nature of American court analysis, it is unlikely that any foreign country's judicial approach will be constructive. However, Groener's value extends beyond the European court's balancing approach. The court, more pertinently, employed a principle of proportionality to evaluate the regulation in Groener.\textsuperscript{239}

Under the principle of proportionality, the language requirement must pursue an objective.\textsuperscript{240} Furthermore, the requirement must be necessary to attain that objective.\textsuperscript{241} With these two factors present, the principle of proportionality is met; conversely, if the requirement is not proportionate to achieving the goal, or unnecessary for the certification, the regulation is likely invalid.\textsuperscript{242} In Groener, the court recognized that use of the Irish language was virtually non-existent in the course of teaching art; in fact, it accepted that "knowledge of the Irish language [was] not required for the performance of the duties."\textsuperscript{243} Yet the requirement that applicants have knowledge of the Irish language in order to receive the appointment was upheld.

Employing the principle of proportionality, the court recognized the state goal in promoting the Irish language.\textsuperscript{244} The requirement was devised

\textsuperscript{236} Frontera, 522 F.2d at 1219.
\textsuperscript{237} Groener, 1 C.M.L.R. at 414.
\textsuperscript{238} Id.
\textsuperscript{239} Id. at 405.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Groener, 1 C.M.L.R. at 413.
\textsuperscript{244} Id. at 414.
to advance the Irish language as a source of national identity and culture.\textsuperscript{245} And given that teachers occupy a particular niche in society, the court found that "some knowledge of the first national language" was a reasonable requirement for teachers in order to receive the permanent appointment.\textsuperscript{246} The "level of knowledge required [could merely not] be disproportionate . . . to the objective pursued."\textsuperscript{247} In other words, the level of language required by the state had to be proportionate to the role in society that teachers played. In the case of \textit{Groener}, the principle of proportionality gave due consideration to promoting the state's official language policy and to protecting the individual's right to pursue her appointment.

In sum, the principle of proportionality offers a reasoned balance between state and individual rights. Rather than forcing a court to focus on the rights of one side, the approach affords protection to both sides in a rational manner. The court can proceed toward a resolution with appreciation for the appeals of both sides and can conclude with equity. The regulations that are upheld under this principle are likely to be fair to the state's police power and to the applicants who seek certification. The public welfare will be protected at the same time that the linguistic rights of applicants are respected. It is this principle of proportionality that may offer guidance in the arena of linguistic rights in the administrative agency context. Had this principle been employed in the U.S. cases of \textit{Frontera} and \textit{Sandoval}, perhaps the reasoning of the cases would have led to more consistent outcomes.

In the case of \textit{Frontera}, application of the principle of proportionality would likely have revealed that the regulation requiring all examinations for carpenter permanent appointment to be held in English was proportionate to the post. On the one hand, the state sought to promote the use of English to ensure a thriving Civil Service operation and to certify competent carpenters for the position.\textsuperscript{248} Moreover, the post of carpenter permanent appointment was one of the highest-paid positions in the city. On the other hand, Frontera could only receive the certification by taking the examination, and the English-only regulation precluded him from taking the examination in any other language than English.\textsuperscript{249} Employing the principle of proportionality, it would seem that some degree of English fluency would be required for the appointment and would further the city's goal of preserving the smooth operation of the Civil Service system. Thus, the English-only examination would demonstrate an applicant's linguistic qualification for the post.

\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} \textit{Frontera} v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975).
\textsuperscript{249} \textit{Id.} at 1216.
sum, the level of linguistic knowledge required of the applicant would be proportionate to his position in society.

Applying the principle of proportionality to the case of Sandoval, a court might find that the requisite level of English for the driver’s license examination was disproportionate to the licensed skill. Among the several rationales offered, the state sought to certify only competent drivers. However, the State had failed to prove that non-English-reading drivers were more dangerous than those who could comprehend the English language. Moreover, the State permitted illiterate applicants to take an oral driver’s license examination in place of a written test; it would suggest that the ability to read English was hardly necessary to drive competently. Thus, the level of linguistic knowledge required of the applicant to pass the driver’s license examination was disproportionate to the skill of driving.

In fact, under the principle of proportionality the state’s interest in certifying competent drivers would have been balanced against the individual’s right to be licensed in a language she understood. As a result, the level of linguistic knowledge required by the state would have been proportionate to the skill of driving. Certainly, one cannot state that driving is a skill without a linguistic component. Some degree of English fluency would likely be appropriate in qualifying for a driver’s license. Therefore, perhaps an examination that contained the critical elements in English and the remainder in the language of choice would have better suited the requisite level of language for safe driving.

VI. FROM LEGISLATION CAME PROPORTIONALITY

Having reviewed Ireland’s approach to linguistic requirements for certification by an administrative agency, it is imperative to note that the European court was able to employ its principle of proportionality because of the language of Article 3(1) of Regulation 1612/68. That is, the legislature had specially removed those conditions that related to the “linguistic knowledge required by reason of the nature of the post to be filled” in Art. 3(1) of Council Regulation 1612/68 from the protection of discrimination based on nationality. Without this phrase, it is unlikely that the court would have considered the relationship between Groener’s position and the

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251. Id. at 490-91.
252. Id. at 491.
254. Id. at 403-05.
level of language required for the post that she sought. It is by this legislated exception that American state legislatures ought to be guided.

At the present, the area of linguistic rights in the context of administrative agencies in the U.S. is perplexing. In an increasing number of states, official English clauses have been amended to state constitutions. Administrative agencies, acting under their delegated authority, have adopted regulations that follow these amendments. Furthermore, courts, bound by their state constitutions and unable to find a federal right to language, have been powerless to give remedy to non-English-speaking plaintiffs who seek certification by the state. The principle of proportionality that is so valuable to the European court is only constructive if an American court has a means by which to employ it. Drawing from the Irish experience, perhaps it is time for American state legislatures to make provisions for their non-English-speaking constituents similar to the exception in Ireland's Regulation 1612/68.

Rather than enacting the simple notion that English shall be the official language of the state and that all state affairs shall be conducted in English, the legislature might consider appending to its official English amendment the concept that the law should not apply to provisions that "by reason of the nature of the post to be filled" require lower levels of linguistic knowledge. By attaching this exemption, the right to minority languages of non-English-speaking applicants will be respected and their liberties will not be constrained by arbitrary, unrelated linguistic requirements.

Administrative agencies will be empowered to assign the requisite levels of English fluency proportionate to the various certifications. By gauging the level of language fluency required to perform a licensed skill, agencies in "exemption" states will be better able to ensure that competent applicants are certified. Moreover, courts in "exemption" states will have the necessary statutory language to employ the principle of proportionality. They will have the means by which to weigh the policy goals of the states against the right to certification in one's native language. Courts will no longer be bound to strike down only those regulations that are "clearly wrong" under the police power, but those that are inequitable as well. With this exemption, in other words, courts will be given the power to administer justice.

255. Art. 48 EEC.
As it stands, the Constitution protects most people within the borders of the United States. Yet some remain without its security. For those who live in the U.S. and cannot, because of administrative agency regulations, obtain certification to pursue their livelihood or their happiness, the Constitution fails to guard their liberties. Yet these are the very people who constitute so insular and discrete a minority that the political process, too, fails them. It is high time that state legislatures recognize the linguistic rights of their non-English-speaking constituents. Using Ireland as a model, state legislatures have much to gain from the Irish experience. They hold the power to rectify this unfortunate situation facing non-English speakers. By enacting an exception to the official English statute, the protection of the Constitution will be extended to another group of American residents.