2010

English Only?--The "Power" of Kentucky's Official Language Statute

Mark A. Flores
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Election Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol98/iss4/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
English Only?—The “Power” of Kentucky’s Official Language Statute

Mark A. Flores

It happens that there are many different languages in the world, and none is meaningless; but if I do not know the meaning of a language, I shall be a foreigner to one who speaks it, and one who speaks it a foreigner to me. 1 Corinthians 14:10–11

INTRODUCTION

A United States citizen struggles to speak English, yet he still walks into a voting booth ready to cast his ballot in an election. 3 While there, he faces “difficulties and rude treatment at the polls.” 4 Others in his situation face similar difficulties and in some instances leave “without casting a ballot due to the absence of bilingual assistance and interference by poll workers and others in [their ability to select] the assistors of their choice.” 5

In this particular case, the United States Department of Justice came to the defense of the Spanish-speaking voters of Springfield, Massachusetts. 6 The city and the Department of Justice reached a settlement under the Voting Rights Act of 1965 that provided, in relevant part, the following:

3. The City shall ensure that Spanish-speaking voters are permitted assistance from persons of the voters’ choice, . . . and that such assistance shall include assistance in the voting booth, including reading or interpreting the ballot and instructing voters on how to select the voters’ preferred candidates.

5. All information that is disseminated by Springfield in English about “registration or voting notices, forms, instructions, assistance, or other

1 Bachelor of Journalism, 1999, Business Foundations Certificate, 1999, University of Texas at Austin; Juris Doctor expected 2010, University of Kentucky College of Law. The author wishes to thank his wife and son for their patience and support throughout his law school career as well as all those who have helped along the way.
2 1 Corinthians 14:10–11.
4 Id. at 3.
5 Id.
6 Id.
materials or information relating to the electoral process, including ballots. 

... shall also be provided in the Spanish language. 7

The settlement also called for training, an advisory committee, and monitoring. 8 This settlement remained in effect until March of 2009. 9 Meanwhile, the United States Supreme Court considered the constitutionality of the Voting Rights Act of 1965, under which the Department of Justice brought its case in Springfield, Massachusetts. While the Court refused to decide the question of the constitutionality of the Voting Rights Act of 1965 in Northwest Austin Municipal Utility District No. One v. Holder, it nevertheless stated the following:

More than [forty] years ago, this Court concluded that "exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation [like the Voting Rights Act of 1965] otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. 10

Thus, while not declaring the Voting Rights Act of 1965 unconstitutional, the Court hinted that it might not survive future constitutional attacks. Commentators acknowledge the underlying tenor of the Holder decision. Edward Blum, the director of the Project on Fair Representation (hereinafter the "Project"), an organization that challenges race-based

8 Id. at 9–12.
9 Id. at 14.
10 Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2516 (2009) (citing South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966)). It is important to note that Justice Thomas filed the only dissent in this eight to one decision. Id. at 2517 (Thomas, J., concurring in part, dissenting in part). In his concurrence/dissent, Justice Thomas wanted to go further than the majority and hold the preclearance requirement of the Voting Rights Act of 1965 unconstitutional. Id. at 2519. In doing so, he compared the present state of this country to its history of post–Civil War racism which prompted the Thirteenth, Fourteenth, and Fifteenth Amendments when he stated the following:

In 1870, the Fifteenth Amendment was ratified in order to guarantee that no citizen would be denied the right to vote based on race, color, or previous condition of servitude. Congress passed [the preclearance requirement] of the [Voting Rights Act] in 1965 because that promise had remained unfulfilled for far too long. But now—not more than [forty] years later—the violence, intimidation, and subterfuge that led Congress to pass [the preclearance requirement] and this Court to uphold it no longer remains.

Id. at 2527.
government policies, described the decision as "an excellent first chop on the log." Blum expressed his expectation of another lawsuit challenging the constitutionality of the Voting Rights Act of 1965 when he claimed that "[the Project has] won the first battle, but the war is not over." While the country continues to question the policies and legality of the Voting Rights Act of 1965, states continue their assault against non-English citizens and their ability to vote. This assault affects not only the Latino population, but also Asian Americans and other citizens of this country. The "English-Only movement" continues to gain momentum as part of the backlash against immigration. Outgoing Republican Kentucky Senator Jim Bunning circulated a letter to his colleagues stating, "[I]n the midst of the largest wave of immigration in our history, there are troubling signs we are letting this priceless gift of unity, our common language, slip away." The letter was intended to inform fellow senators of the importance of a National Language Act making English the official language of government.

As a result of the continued emphasis on English-only statutes and the possibility that civil rights legislation like the Voting Rights Act of 1965 could face more constitutional challenges, the procedures used to vote in the United States could face a major crossroads as the courts attempt to balance the interests of non-English speaking voters against the interests of local governments in conducting elections in the manner they see fit. This Note will analyze this problem using Kentucky's current restrictions on non-English writings. Part I will state the current law of the Commonwealth of Kentucky requiring English for all writings, determine how the Kentucky Board of Elections interprets the statute, and discuss the effects it has on...

11 See, e.g., Damien Cave, Ruling Prompts a Mixed Response, N.Y. TIMES, June 23, 2009, at A16 (quoting Edward Blum) (internal quotation marks omitted).
12 Id. (quoting Edward Blum) (internal quotation marks omitted).
13 See infra text accompanying notes 196-98.
15 William M. Welch, English-Only Laws Gathering Steam, USA TODAY, June 19, 2008, at 3A.
17 Id.
18 Id.
19 See supra text accompanying notes 3-18.
20 KY. REV. STAT. ANN. § 446.060(2) (West 2006).
Kentucky citizens. Part II will demonstrate how this interpretation violates Kentucky's constitutional requirement that "[a]ll elections shall be free and equal." Part III will explain how this interpretation violates the First Amendment as incorporated by the equal protection provisions of both the Kentucky and Federal Constitutions. Part IV will apply this analysis on a national scale. Finally, Part V will examine these interpretations and decisions in light of recent attacks on the Voting Rights Act of 1965 before the United States Supreme Court.

I. KENTUCKY STATUTE—WRITINGS REQUIRED TO BE IN ENGLISH.

As the 2010 census quickly approaches, the Kentucky State Board of Elections (hereinafter the "Board") will keep a close eye on the numbers coming out of Washington, D.C. Executive Director Sarah Johnson explains that the federal Voting Rights Act of 1965 will require Kentucky to print all documents in Spanish and provide interpreters if the amount of Spanish-speaking citizens in the state reaches a threshold of five percent or 10,000 Spanish-speaking voters in a political subdivision. This is a scenario many states have faced in the past and will face in the immediate future.

The Voting Rights Act of 1965 came up for renewal in 2006. Nearly eighty Republican Representatives signed a letter speaking out against the provisions mandating that states print ballots in other languages or provide

---

21 Ky. Const. § 6.

22 Telephone Interview with Sarah Johnson, Executive Director, Ky. State Bd. of Elections, in Frankfort, Ky. (Jan. 26, 2009) [hereinafter Jan. 2009 Telephone Interview with Sarah Johnson].

23 Id.; 42 U.S.C. § 1973aa–1a(a)–(b)(1) (2006). Johnson believes none of Kentucky's political subdivisions will come close to the trigger in the Voting Rights Act of 1965 at this time. She also notes the first election it would affect in Kentucky, should the non–English speaking population reach the trigger in the Voting Rights Act of 1965, is 2012. Johnson says the Justice Department would send out notices if this occurred in any Kentucky political subdivisions to the State Board of Elections. Telephone Interview with Sarah Johnson, Executive Director, Ky. State Bd. of Elections, in Frankfort, Ky. (Mar. 16, 2010) [hereinafter Mar. 2010 Telephone Interview with Sarah Johnson]. Though the language most likely to raise this issue in Kentucky is Spanish, other non–English languages are equally applicable. As such, Spanish should only be considered as a framework for non–English languages in the face of this policy with the understanding that this Note applies to all non–English speaking citizens, not just Spanish speakers.

24 See, e.g., Bill Egbert, Westchester to Up Poll Aid for Hispanics, DAILY NEWS (N.Y.), Jan. 20, 2005, at 2; Craig Gilbert, Sensenbrenner Backs Keeping Bilingual Ballots; Immigration Fire Feeds on Mandate Extension, MILWAUKEE J. SENTINEL, May 5, 2006, at A3; Rachel Jackson, Woman Sues Over Lack of Spanish Ballot, ORLANDO SENTINEL (Florida), Nov. 26, 2008, at B3; Colleen Mason, Kane County Hurries to Aid Hispanic Voters, CHI. TRIB., Sept. 23, 2004, at METRO1.

The letter stated that "[t]he multilingual ballot mandate encourages the linguistic division of our nation and contradicts the 'Melting Pot' ideal that has made us the most successful multi-ethnic nation on earth." In the end, however, Congress renewed the Voting Rights Act of 1965 with a promise of strict enforcement by then President George W. Bush.

In Kentucky, the possibility of having to meet this mandate could arise sooner rather than later. According to the U.S. Census Bureau, Kentucky, along with other states in the Southeast, has seen an increase in its Hispanic/Latino populations. This result mirrors the national trend, which shows that the Hispanic population will triple from 46.7 million people in 2008 to 132.8 million people by 2050. That number will result in nearly one in three people inside the United States having a Hispanic background. Of that one-third, some will likely not speak English as a native language, driving the percentage of Spanish-speaking voters closer to the five percent trigger and consequently requiring official documents to be in the language of the minority.

At this point, however, Johnson says the Board has not looked into the possibility. She also acknowledges that a change could carry a high price tag. Furthermore, Johnson explains the Board staff believes Kentucky law prohibits the Board and all of state government from printing documents in a language other than English. This includes not only


27 Id.


31 Id.

32 See generally Mar. 2010 Telephone Interview with Sarah Johnson, supra note 23.

33 Jan. 2009 Telephone Interview with Sarah Johnson, supra note 22.

34 Id. Johnson notes the Board has no idea how expensive the changes could be since the Board has never felt the non-English speaking population was close to the trigger in the Voting Rights Act of 1965. Mar. 2010 Telephone Interview with Sarah Johnson, supra note 23.

35 Mar. 2010 Telephone Interview with Sarah Johnson, supra note 23. Johnson points out, however, that the Board has no formal position since the issue has never come up in a formal board meeting or before a General Assembly committee. As a result, she believes more research could help flesh out the statutory restriction but, as for now, she maintains that "absent a federal mandate, the writings statute would prohibit ballots and registration forms in languages other than English." Id.
ballots but also registration forms and any other materials printed by the Commonwealth.³⁶

The Board staff bases its English–only printing of all ballots and registration forms on Kentucky Revised Statutes (KRS) § 446.060, titled “Writings; Signature must be at end; To be in English.”³⁷ The statute is organized under Title XLI Laws, Chapter 446, titled “Construction of Statutes,” and states the following:

(1) When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing.

(2) Every writing contemplated by the laws of this state shall be in the English language.³⁸

According to Johnson, the second subsection above restricts local governments from printing their official documents in any language other than English.³⁹ The Kentucky Statute Revision Commission added this second subsection in 1942 “in lieu of various provisions of former laws requiring writings to be in the English language.”⁴⁰

To see how this addition came about, one must first briefly examine the history of Kentucky statutes to understand the evolution of the Commonwealth’s statutory framework. During the latter part of the 1930s, the Statute Committee of 1936 and its editorial staff “focused on eliminating from the accumulation of seventy years of legislation those provisions no longer in force or effect, and restating and compiling the remainder in an understandable form.”⁴¹ As a result, the Kentucky Revised Statutes became the law of the Commonwealth in 1942.⁴²

The relevant inquiry then turns on how the state courts interpret “writings” under the original statute since the Revised Statutes codified an older version of the requirement. Kentucky’s high court answered that question in 1922 in Terrell v. Commonwealth.⁴³ A grand jury indicted Kye Terrell for murder.⁴⁴ The only meritorious defense raised on appeal, according to the court, concerned a grand juror’s signature immediately above the endorsement of the indictment and not immediately following

³⁶ Id.
³⁹ Mar. 2010 Telephone Interview with Sarah Johnson, supra note 23.
⁴² Id.
⁴³ Terrell v. Commonwealth, 240 S.W. 81 (Ky. 1922).
⁴⁴ Id. at 83.
as required in then section 468 covering writings in the Commonwealth.\textsuperscript{45} Section 468 was the precursor to KRS § 446.060. As stated by the court, “If . . . the ‘writing’ referred to in that section, the signing of which is required to be at its end or close, was intended to include the signing of the name of the foreman upon the indictment . . . there exists some ground for this extremely technical objection.”\textsuperscript{46}

In its analysis, the court noted that the writing in the statute is required “to be signed by a party thereto.”\textsuperscript{47} The court found this language to encompass not everyday writings, but rather writings “which conferred rights and imposed obligations upon those who did execute it . . . and includes only such writings as are contractual or quasi contractual in their nature and to which there must necessarily be parties.”\textsuperscript{48} It ruled that this “writing” was not of a contractual nature; as a result, it did not come under the statute concerning writings, a precursor to KRS § 446.060.\textsuperscript{49}

Kentucky’s high court had previously stated in 1920 that when the General Assembly

has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating upon the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.\textsuperscript{50}

The Terrell holding regarding writings came in 1922; therefore, it must be presumed that the 1942 General Assembly knew KRS § 446.060 covered only the writings stated by the court in Terrell v. Commonwealth. As a result, when the General Assembly passed the Revised Statutes in 1942, it presumably knew that putting the English “writing” requirement in the statute dealt solely with contracts as defined in Terrell. Thus, the “writing” statute covers only contracts or quasi contracts based on the circumstances and context. As a result, the writings contemplated in KRS § 446.060 deal only with those you would see in business settings requiring the receipt or deprivation of current or future rights.

The General Assembly appears to understand this proposition through its requirements that corporate documents,\textsuperscript{51} documents outlining alternatives

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 84 (internal quotation marks omitted).
\textsuperscript{48} Id. (emphasis added).
\textsuperscript{49} Id. at 84–85.
\textsuperscript{50} Commonwealth, by Byars v. Alford’s Ex’r, 218 S.W. 721, 722 (Ky. 1920).
to abortion and the characteristics of the fetus, and insurance documents be filed in English. This understanding becomes more apparent when considering recent attempts to change the official language statute.

In 1984 the General Assembly passed, and the governor signed into law, a bill authorizing an official state language. KRS § 2.013, titled “State language,” states that “English is designated as the official state language of Kentucky.” The General Assembly, however, has generally treated this provision as a largely symbolic statute. It is placed in the statutes alongside others detailing the state seal and state flag and making the cardinal the state bird of Kentucky and the gray squirrel the state wild animal game species. As a result, representatives in the General Assembly attempted to pass a bill in 2007 to amend the statute by providing “that unless otherwise authorized or provided by law, all documents produced or utilized by the Commonwealth or its political subdivisions shall be in the English language only.” The bill, incidentally, never came out of the House State Government Committee and died without any true action taken on it.

At least one other court agrees that an official language statute like KRS § 2.013 cannot prohibit other languages from use in ballots or voter registration forms. Considering the “English as the official language” statute in Illinois, the Seventh Circuit held that it did not prohibit local governments from giving voting assistance in Spanish. The court also held a provision of the Illinois State Constitution requiring that “all official writings … be conducted, preserved and published in no other than the English language” as not prohibitive of bilingual assistance. In doing so, the Seventh Circuit noted various state and city agencies publishing and providing services in Spanish.

Though Kentucky does not offer voting materials in Spanish, it does offer other services in Spanish. These include materials on how to quit

55 Id.
56 See id. § 2.020.
57 See id. § 2.030.
58 See id. § 2.080.
59 See id. § 2.085.
61 Kentucky Legislature, 07RS HB12, http://www.lrc.ky.gov/record/07rs/hb12.htm (last visited Mar. 17, 2010) (explaining the legislative history of the bill, showing the House introduced the bill on January 2, 2007, before sending it to the House State Government Committee with no further action noted).
63 Id. at 577 n.1.
64 See id. at 577.
smoking, family rights documents regarding state-provided therapy, and even seminars in Spanish regarding fair housing. These examples only further the argument that the English-only requirement in KRS § 446.060 does not apply as broadly as stated by the Board staff. Furthermore, a voter who cannot read English may still receive assistance in voting at the polls and the statute does not prohibit non-English materials, much like the Illinois statute. When dealing with the Illinois statute, the Seventh Circuit held the "official language" statute did not prohibit bilingual voting materials. Courts of local jurisdiction, in Kentucky and the Sixth Circuit, would likely hold similarly. KRS § 446.060, therefore, cannot be interpreted to require all state documents to appear only in the English language.

II. Violation of the Kentucky Constitution

"All elections shall be free and equal."
Kentucky Bill of Rights, Kentucky Constitution § 6

While not in the Federal Constitution, the Kentucky Constitution does establish a right to free and equal elections. Thus, if the local courts refused to find a misinterpretation of the English writings requirement or the General Assembly amended the official language statute as attempted in 2007, this outright requirement would violate the Bill of Rights in the Kentucky Constitution. As stated above, section six of the Kentucky Constitution mandates that "[a]ll elections shall be free and equal." The provision appears in Kentucky's Bill of Rights, which provides for free and equal elections so "[t]hat the great and essential principles of liberty and free government may be recognized and established."

In reviewing statutes for constitutionality, Kentucky courts do not consider "the wisdom, need or appropriateness of legislation, nor the purposes motivating it," but rather they analyze the meaning of the law
and the constitutionality of that meaning. In doing so, the court will hold the statute valid "unless it clearly offends the limitations and prohibitions of the [Constitution, within which is everything contrary to the policy and genius of our form of government.] The burden of showing that a law does not pass constitutional muster lies with the person challenging the law's validity in the first place. If the court finds the challenger has met his burden, section 26 of the Kentucky Constitution requires that "all laws contrary to the Bill of Rights, or contrary to this Constitution, shall be void."

If a statute, therefore, removes from Kentucky citizens the ability to have a free and equal election, Kentucky courts must hold it unconstitutional. The obvious question, however, centers on the meaning of "free and equal." Kentucky's highest court has held that "[t]he right to . . . vote and be voted for is a constitutional right." The court later refined this right by stating the following:

[A]n election is free and equal within the meaning of the Constitution only when it is public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Of the above-mentioned criteria, the one most relevant to the present issue is whether the regulation denies the vote itself or makes it so difficult as to amount to a denial. Since election documents include not only the ballot but other materials like the voter registration card, this Note will look at both to determine whether requiring these documents in English "clearly offends the limitations and prohibitions of the [Constitution."

A. The Kentucky Registration Form

Kentucky's high court has held that "the provisions of registration laws must be reasonable, uniform, and impartial, and must not deny nor abridge

---

74 Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 823 (Ky. 1942).
75 Id.
76 Id.
77 Id.
79 Id. § 6.
80 Asher v. Arnott, 132 S.W.2d 772, 775 (Ky. 1939).
81 Queenan v. Russell, 339 S.W.2d 475, 477 (Ky. 1960) (citing Asher v. Arnott, 132 S.W.2d 772, 775 (Ky. 1939)).
82 Johnson, 165 S.W.2d at 823.
the constitutional right of suffrage, nor unnecessarily impede the right."\textsuperscript{83} The court stated it would hold void any regulations that violated these guidelines.\textsuperscript{84} Since requiring registration forms in English-only would be a uniform and impartial requirement, this Note will not analyze this factor.\textsuperscript{85} Everyone would have to fill out the same form, and the requirements do not change from person to person. This leaves only the reasonableness requirement and the denial of the right of suffrage as potential violations by an English-only requirement for voter registration forms.

1. Reasonableness.—The purpose of section six of the Kentucky Constitution, according to Kentucky's high court, is to require that "the Legislature in enacting registration laws . . . has not the power to enact such a law as will add to the voter a qualification necessary to exercise the right of suffrage."\textsuperscript{86} As a result, if the registration law unreasonably restricts the ability of a potential voter to cast a ballot by adding qualifications necessary to vote, a Kentucky court will strike it down.

The requirement to register as a voter provides a good place to start when considering whether a registration statute unreasonably adds qualifications necessary to vote. While Kentucky case law has recognized the registration requirement as an added qualification, the courts have held that the "rule of common sense and reason" allows the legislature to add this qualification, provided it does not deny the "constitutional right of the elector to vote."\textsuperscript{87} In stating that the registration requirement itself did not present an unreasonable added qualification, the court quoted North Carolina law and stated that the purpose of a registration law "is to facilitate the exercise of the right of the ballot, and not to defeat it."\textsuperscript{88} As a result, Kentucky's highest court has also held, in regards to the registration process, that "when such laws add to the qualifications prescribed by the Constitution, or impose unreasonable conditions of the exercise of the privilege of voting, . . . courts can interfere."\textsuperscript{89}

\begin{footnotes}
\item[83] Perkins v. Lucas, 246 S.W. 150, 154 (Ky. 1922).
\item[84] Id.
\item[85] The author recognizes that an English-only requirement for registration forms could show partiality towards those that can read English and exclude certain populations, like recent immigrants, which could be considered race-based discrimination and a violation of equal protection. The Supreme Court of the United States, however, has held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). It is hard to imagine the Board would take intentionally racially discriminatory action in this day and age. Further discussion of other potential equal protection violations, however, can be found in a later section of this Note. See infra Part III.
\item[86] Perkins, 246 S.W. at 153.
\item[87] Id. at 154.
\item[88] Id. (quoting People ex rel. Van Bokheln v. Canady, 73 N.C. 198, 223 (N.C. 1875)).
\item[89] Commonwealth v. McClelland, 83 Ky. 686, 691 (Ky. 1886).
\end{footnotes}
Kentucky courts, therefore, should focus on whether the Board's observance of the English-only requirement is reasonable in facilitation of the voting process while ensuring it does not defeat Kentucky citizens' ability to vote. The Board could classify the registration requirement and the English-only requirement it applies to the forms as reasonable in an effort to protect against voter fraud. The Board could also argue that the requirement is reasonable because it fosters administrative efficiency by not requiring registration forms in the many different languages that will eventually be spoken in this country as more immigrants come from places other than Spanish-speaking countries. Lastly, the Board could justify this requirement by pointing to the costs associated with preparing and distributing forms that few people would use.

While Kentucky courts have little case law on what it would consider reasonable, the United States Supreme Court has handled the issue under a due process analysis. The Court in *Meyer v. Nebraska* established, and the Supreme Court continues to follow, the following test for a due process violation: “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.” In applying this test, however, the Supreme Court has recognized that while efficiency can provide a legitimate state interest, “the [Federal] Bill of Rights in general . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy,” thus requiring a greater showing to prove reasonableness.

Applying this standard, the state will have a hard time showing that this requirement is a reasonable means to achieve efficiency, especially in today's age. The state would have no difficulty finding translators to make the voter registration cards multilingual. It also could avoid printing costs by making the applications available online. Notably, the Board already makes the application available on its Web site to print, complete, and send in for processing. It seems unreasonable not to allow this option to those who struggle with English by simply translating it and posting the variation on its Web site.

Furthermore, the English-only requirement adds a qualification to voting as forbidden by Kentucky law, namely an implicit requirement to be able to read and write English. Kentucky courts, however, could struggle in determining whether this requirement “clearly offends the limitations

---

91 *Id.* at 399-400; *see also* *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1348 (1977).
and prohibitions of the Constitution. Since the registration law does not explicitly impose it. As with many of the issues involved in the analysis, this determination could prove a close call.

2. **Denial of the Right to Vote.**—In dealing with registration laws challenged under the "free and equal" portion of the Kentucky Constitution, the Kentucky Supreme Court has stated that "elections are free and equal only when all who possess the requisite qualifications are afforded a reasonable opportunity to vote without being molested or intimidated." These words should be used to provide some guidance to the requirement that the registration process "not deny nor abridge the constitutional right of suffrage, nor unnecessarily impede the right." Kentucky courts have held that force and/or intimidation are not necessary to show a vote so difficult as to amount to a denial. As a result, non-English speakers could make an argument that the inability to read the documents and register to vote effectively denies them the opportunity to cast a ballot on election day. This argument, however, could again prove a close call.

As stated above, the purpose of registration laws is to ensure that only qualified voters have the opportunity to vote. Though one could argue that the English-only nature of the registration form impedes the right of suffrage for those citizens who cannot read English, non-English speaking voters do not differ from illiterate voters. Illiterate voters can request assistance to vote in the same way that non-English speakers can request help at the polls. Just as importantly, no successful challenges to the registration statutes by an illiterate voter exist at this time. As a result, a court would likely require the state to commit a more egregious action in addition to refusing to print ballots in other languages to find it "molest[ed] or intimidate[d]" non-English speaking voters.

3. **Policy behind a Change.**—Regardless of the outcome of any potential challenges to the restriction on non-English language materials, the rationale for changing this policy goes straight to the rationale of the registration statutes. The legislature wants to ensure "free and equal" elections, as required by the Kentucky Constitution, by not allowing fraudulent votes. Refusing to allow bilingual voter registration forms, however, could lead to increased voter fraud. The lack of bilingual registration documents presents an intimidating impediment to someone who cannot read the English

---

94 Johnson v. Commonwealth ex rel. Meredith, 165 S.W.2d 820, 823 (Ky. 1942).
95 Commonwealth v. McClelland, 83 Ky. 686, 693 (Ky. 1886).
96 Perkins v. Lucas, 246 S.W. 150, 154 (Ky. 1922).
97 Hocker v. Pendleton, 39 S.W. 250, 250 (Ky. 1897).
98 McClelland, 83 Ky. at 693.
language to understand what they are signing. At that point, another person must translate the document. The existence of a middleman inevitably leads to questions regarding possible voter fraud. As the illiterate person cannot fully understand the writing on the registration card, unnecessary confrontations can occur and, just as importantly, questions may arise regarding the true motives behind the registration, a problem highlighted in recent challenges to registrations by groups like ACORN.\(^1\) This issue will likely be litigated as the registration group community grows, and courts will have to make a determination regarding the validity of the registration. In the end, the Kentucky courts should resolve the issue in favor of whatever position protects the integrity of the “free and equal” election by completely informing the electorate of the voting process in whatever language necessary.

**B. Kentucky Ballots**

In *Hocker v. Pendleton*,\(^{101}\) Kentucky’s high court set aside an election due to a large proportion of electors not having the chance to vote because of “a failure of the officers to supply ballots, booths, stencils, etc.”\(^{102}\) In the later case of *Smith v. Kelly*,\(^{103}\) the court stated that “if there existed any statute . . . as to deprive a large portion of [voters] of a reasonable opportunity to cast their ballots, the statute would be unconstitutional and void.”\(^{104}\) Using the *Hocker v. Pendleton* rationale regarding the deprivation of a large percentage of voters of the opportunity to vote, the court in *Smith v. Kelly* ruled that not having enough sufficiently prepared precincts for people to vote violates the guarantee of “free and equal” elections in the Kentucky Bill of Rights.\(^{105}\)

Thus, Kentucky courts must consider whether the failure to provide Spanish language assistance results in a failure to supply materials required to vote. If this is the case, the courts must then consider whether a large portion of voters are being deprived of a reasonable opportunity to cast ballots as a result of the provision. As stated in the Eastern District of Louisiana, “[I]f an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful.”\(^{106}\) The court held absurd the “notion that an illiterate has the right [to] pull the lever of a voting

---

101 *Hocker*, 39 S.W. 250.
102 *Id. at 250.*
103 *Smith v. Kelly*, 58 S.W.2d 621 (Ky. 1933).
104 *Id. at 622.*
105 *Id. at 623.*
machine, but not the right to know for whom he pulls the lever." 107

Yet, even if it is conceded that Kentucky must make changes, it does not necessarily follow that the Commonwealth and local governments must provide materials in Spanish to ensure a "fair and equal" election under the Kentucky Constitution. The Supreme Court of California overturned a former section of the California Constitution requiring that voters have the ability to read English, but it refused to require a "bilingual electoral system." 108 In doing so, it recognized the state's interest in avoiding the "cost and administrative complexity," which includes the "expense of translating, printing and distributing ballots, sample ballots, and ballot pamphlets ... in both English and Spanish." 109 Thus, the California Supreme Court held that particular section of its state constitution a violation of the Equal Protection Clause under the Fourteenth Amendment but refused to require California to change its method of voting. 110

In the decision, the court explicitly held that overturning that section of the California Constitution does not imply that the state must provide perfect voting conditions in allowing for an equal opportunity for all qualified citizens to vote. 111 The court thought that Spanish-speaking voters could prepare by studying sample ballots with other English speakers, have ballots translated in their own communities, and receive electoral commentary by Spanish news media. 112

The California court's approach would not translate in Kentucky, however, because the same support systems existing in California for the Spanish-speaking community, 113 such as an extensive Spanish news media, does not exist in the Commonwealth. Lexington is the second largest city in Kentucky and is referred to by those outside the Commonwealth as a "modern city with a passion for history." 114 The local Hispanic population

107 Id.
109 Id.
110 Id. at 257–58.
111 Id.
112 Id. at 258.  
113 See id. at 254–55 ("Elight Spanish language newspapers are published in Los Angeles County, two of which are published daily, the remainder at weekly intervals. Nine additional Spanish language newspapers which are published elsewhere in the United States, in Mexico, or in South America also circulate in Los Angeles County. Eleven Spanish language magazines are available, two of which, Grafica and La Raza, are published in Los Angeles and are devoted primarily to discussion of national and local political affairs. The nine remaining include Spanish translations of Life (Life en Espanol) and Readers' Digest (Selecciones)"). Another listing of media in Los Angeles shows five television stations, and one radio station delivering the news in Spanish. Los Angeles California Local News Media—Los Angeles Newspapers, Magazines, Radio & TV Stations, http://www.mondotimes.com/i/world/us/5/242 (last visited Mar. 16, 2010).
nearly tripled between 1990 and 2000 from 5,765 to 16,479. One local expert posited that the growth resulted from the large number of Latinos that came to work on the horse farms and tobacco fields in the 1970s. This growth, coupled with a rise in business, prompted the Kentucky Chamber of Commerce to hold a meeting in 2009 on the possibility of forming a statewide Hispanic Business Council.

The general community has not been as quick to respond. In Lexington, the first workplace Spanish courses only began appearing within the last twenty years. The first and only widely-circulated Spanish newspaper in Lexington, La Voz, began printing less than ten years ago. Even more indicative of the problem is the story of a Honduran man sent to prison for murder in Kentucky after an “interpreter translated the word ‘life’ as ‘libra,’ or ‘scale.’” In 2002, the man had his conviction for murder reduced to reckless homicide and was released from prison. Current Kentucky Supreme Court Justice Mary Noble wrote, when handling the case, that “[o]ut of ignorance, all assumed one who speaks Spanish or is born in a Spanish-speaking world can interpret . . . . This case reveals that this is a false assumption.”

Accordingly, while Kentucky’s number of Spanish-speaking citizens continues to grow, the willingness of the overall community to provide the type of support relied upon in California has yet to materialize. Thus, the

115 Robert Schoenberger, Hispanic Businesses Gaining Momentum in Louisville Area, COURIER-JOURNAL (Louisville, Ky.), Mar. 22, 2006, at 1A.
116 Id.
117 Press Release, Kentucky Chamber of Commerce, Meeting Planned to Explore Formation of Kentucky Hispanic Business Council (Jan. 5, 2009) (on file with author). The Chamber cancelled the first meeting due to an ice storm that hit the area but later held follow-up meetings. E-mail from Jessica Fletcher, Communications Manager, Kentucky Chamber of Commerce, to Mark Flores, Author (Jan. 30, 2009, 09:05 EST) (on file with author). While it determined there was not enough interest to form a statewide Kentucky Hispanic Business Council, the Chamber continues to “[e]ncourage local chambers to create local synergies with the Hispanic business community, and several have had success—specifically Bowling Green and Greater Louisville[,] Inc.” Id.
119 Risa Brim, Publisher Plans Monthly Issue of La Voz,LEXINGTON HERALD-LEADER, May 19, 2001, at B1. At the time, it was reported La Voz was the only Spanish-language paper in Kentucky. Id. This is no longer the case. Al Dia now serves the Louisville market. La Voz, Al Dia Combine Resources, BUS. FIRST OF LOUISVILLE, Nov. 19, 2009, http://louisville.bizjournals.com/louisville/stories/2009/11/16/daily39.html. Both La Voz and Al Dia publish bi-weekly and print 20,000 copies combined per publication. Id.
121 Id.
122 Id. (internal quotation marks omitted).
rationale provided by the California Supreme Court is not applicable to Kentucky. Though the few Spanish language papers could translate ballots and initiatives in their publications, the opportunity for commentary through the media is almost non-existent. With limited Spanish language media in Kentucky, the possibility of leading ill-informed voters to the booth is a legitimate concern and could lead to corruption or even fraud. The possibility of corruption and fraud does not afford anyone a "free and equal" election. As such, voters must have the materials needed to cast an appropriate ballot.

If a court were to recognize that Kentucky needs to require materials in Spanish, the court would still have to find that the absence of bilingual materials would deprive a large percentage of citizens of their right to vote, as stated in Hocker v. Pendleton. The court in Hocker gives no guidance as to precisely what number would constitute a large percentage. A look at the Voting Rights Act of 1965, however, can provide a reasonable start. The Voting Rights Act of 1965 uses the threshold of more than 10,000 voting age citizens of a political subdivision or more than five percent of the voting age citizens of a state or political subdivision as the trigger for federal requirements dealing with language. Since federal provisions would kick in at this point anyway, a Kentucky court would likely have no problem agreeing with the numbers stated in the Voting Rights Act of 1965 as "any large proportion of the electors" being deprived of their vote. If a Kentucky court did agree with the federal provision numbers and the situation remained unchanged, the Board would need to provide materials in a language other than English to ensure that it does not violate either section six of the Kentucky Constitution or the Voting Rights Act of 1965.

III. Equal Protection Violation of First Amendment Rights

A. Kentucky and Federal Equal Protection of Constitutional Rights

The Kentucky court should also find that a restriction on all other languages besides English violates citizens' rights to equal protection as provided in the Fourteenth Amendment of the United States Constitution and as provided in the Kentucky Constitution. The Kentucky Constitution states that "[t]he General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following reasons..." 128

124 Hocker v. Pendleton, 39 S.W. 250, 250 (Ky. 1897).
126 Hocker, 39 S.W. at 250.
127 U.S. CONST. amend. XIV, § 1.
128 Ky Const. § 59; see also Tabler v. Wallace, 704 S.W.2d 179, 183 (Ky. 1985) (discussing section 59 of the Kentucky Constitution and a comparison to the Equal Protection Clause of the Federal Constitution).
the following purposes, namely: ... [t]o regulate the limitation of civil or criminal causes." 129 It also states, in earlier sections, the following:

All men are, by nature, free and equal, and have certain inherent and inalienable rights . . . . 130

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. 131

All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services . . . . 132

When put together, the Kentucky Supreme Court has held that these provisions of the Kentucky Constitution “embrace the [E]qual [P]rotection [C]lause of the Fourteenth Amendment.” 133 As a result, Kentucky’s highest court has used the same tests as applied by the United States Supreme Court, using the Supreme Court’s precedent to determine if a statute violates Kentucky’s version of equal protection. 134 If the statute violates Kentucky’s version of equal protection, it also violates the Fourteenth Amendment of the United States Constitution.

In Bush v. Gore, 135 arguably the most famous equal protection voting case, the Supreme Court of the United States stated that “[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental.” 136 This continues the Court’s policy of ensuring that once the legislature gives the right to vote, “lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” 137

In Kentucky, KRS § 118.425 governs the election of “electors of President

129 Ky Const. § 59.
130 Id. § 1.
131 Id. § 2.
132 Id. § 3.
133 Tabler, 704 S.W.2d at 183.
134 See Johnson v. Dixon, 501 S.W.2d 256, 257–58 (Ky. 1973); Beacon Liquors v. Martin, 131 S.W.2d 446, 448 (Ky. 1939).
135 Bush v. Gore, 531 U.S. 98 (2000). The author acknowledges that the Supreme Court of the United States held that its consideration of the equal protection violation in Bush v. Gore was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” Id. at 109. Consequently, the opinion in Bush v. Gore does not answer the question of when a violation of the Equal Protection Clause relating to election law has occurred. Id. at 104. Thus, this Note will only cite to Bush v. Gore for the purpose of demonstrating the fundamental nature of the right to vote and when the Court would allow a voter to raise an equal protection question. For an interesting discussion of this topic, see generally Adam Cohen, Editorial, Has Bush v. Gore Become the Case That Must Not Be Named?, N.Y. TIMES, Aug. 15, 2006, at A18.
136 Bush, 531 U.S. at 104.
and Vice President of the United States." The procedure requires the Board to meet and certify which candidates received the highest number of votes. The certification of votes "shall constitute a determination that the electors nominated by that party have been elected." As such, citizen voters indirectly decide the selection of the electors and how they will vote. Because Kentucky allows the citizenry to participate in the vote for President, equal protection standards apply, including those associated with the First Amendment.

B. Requiring English-Only Violates First Amendment Rights—Restricting the Documents

The Fourteenth Amendment incorporates First Amendment protections; therefore, state and local regulations dealing with prohibitions of speech will require a "stricter standard of review" than the more lenient rational basis review applied in ordinary equal protection analysis. As stated in Carey v. Brown, "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." In 2007 the Alaska Supreme Court declared a provision of an English-only statute requiring the government use English for all of its functions unconstitutional under the Fourteenth Amendment as a result of the Fourteenth Amendment's incorporation of First Amendment rights protected by Alaska's state constitution and the United States Constitution. The Kentucky Constitution, like the United States Constitution, has a freedom of speech amendment built into its Bill of Rights as well. As stated above, the Kentucky Supreme Court has held the United States Equal Protection Clause equally applicable at the state and local levels via the Kentucky Constitution. The United States Supreme Court has also discussed the fundamental rights of freedom

139 Id.
140 Id.
141 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 n.75 (1973) (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 (1972)).
142 Id.
143 Id. at 34 n.73.
145 Id. at 461-62 (citing Mosley, 408 U.S. at 98-99, 101).
147 Ky. Const. § 8.
148 See supra notes 87-89.
of speech and of the press as follows: “Freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the [Due Process Clause of the Fourteenth Amendment] from impairment by the States.”

This Note, therefore, will use federal jurisprudence in analyzing First Amendment law. Reasoning similar to that used by the Alaska Supreme Court interpreting the United States Constitution and the First Amendment will serve as a guide as this Note employs United States Supreme Court decisions in the analysis.

In Alaska, citizens approved a statute that “require[d] the state to use English in all government functions and actions.” The statute was later codified and interpreted as “[requiring] the use of English by all government officers and employees in all government functions and actions at the state and local levels.” Proponents of the statute argued that the Supreme Court allowed state governments to “determine the content, form, and manner of its own speech.” As stated by the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*, “[W]hen the State is the speaker, it may make content-based choices.” The Alaska Supreme Court, however, held that the “state-as-speaker” doctrine could not apply as broadly as it did in the English-only statute. It stated that the “doctrine govern[ed] communications made by a defined group of government employees or agents in the pursuit of narrowly-focused policy goals.”

Here, the communication at issue includes voting materials and voter registration cards. The policy goals involved are likely similar to the state’s “professed desire to avoid the cost and administrative complexity entailed in providing a bilingual electoral system” referred to by the California Supreme Court in *Castro v. State*. The communications are also made by a defined group of government employees. As a result, government entities, such as the Board, may have an interest that satisfies heightened scrutiny under the Equal Protection Clause. The Supreme Court of the United States, however, has held that the type of review will depend on the restriction imposed by the challenged state action and its impact. Justice

---

150 *Kritz*, 170 P.3d at 187.
151 *Id.* at 197.
154 *Id.* at 833.
155 *Kritz*, 170 P.3d at 199.
Scalia, writing for the majority in Vieth v. Jubelirer, stated that "[a]n action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable."\(^8\)

In the past, the Supreme Court has upheld the constitutionality of state restrictions on the appropriation of federal funds for use in abortions\(^16\) and the distribution of funds, without regard to the type of speech, for student organizations.\(^16\) The harms associated with these examples were financial and hardly involved fundamental rights. Kentucky's high court, however, has long recognized the right to vote as a fundamental right,\(^16\) and the United States Supreme Court has "made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction . . . [and that] the purpose of [a voting] restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."\(^16\) As a result, a more heightened level of scrutiny than that which applies in typical state restriction challenges must apply to state actions that take away a citizen's constitutionally protected rights under the Kentucky and United States Constitutions.

The problem with Kentucky's approach to the English-only statute is that it completely bans local county and municipal governments from communicating in another language, regardless of the local governments' preferences. This policy also infringes on the citizens' First Amendment rights. The United States Supreme Court held that "[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read."\(^16\) Essentially, the right to receive information depends on the existence of an "able and willing [speaker] to provide them with information about the government."\(^16\) If Kentucky courts hold that the English-only stance on

\(^{158}\) Id.


\(^{161}\) Chrisman v. Bruce, 62 Ky. (1. Duv) 63, 67 (Ky. 1863) ("[Voting] is [a] fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against. The [Kentucky Constitution] declares that 'all elections shall be free and equal;' that the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices.").


documents is constitutional, then there will be no willing and able speaker. As a result, the rights of citizens to have documents in languages other than English will necessarily hinge on a willingness from the government and the constitutionality of the ban on non-English language documents.

The United States Supreme Court will apply "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." This content-based analysis requires "that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Other restrictions, like time, place, or manner restrictions, will receive an intermediate level of scrutiny. The Supreme Court has explained this level of scrutiny as follows:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

As a result, a court must first decide the type of restriction imposed before ruling on its constitutionality.

The Supreme Court explained that "the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." The Court stated, however, that it will not require a showing of a content-based purpose to classify a restriction as "content based." It justified that stance as follows:

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.

The importance of this distinction could mean the difference between

170 Id.
171 Id. at 643 (citations omitted).
winning and losing the case since content-based restrictions require strict scrutiny, which "almost always results in invalidation."\textsuperscript{172} The Court's rationale centers on "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."\textsuperscript{173} Accordingly, the true test comes in determining whether the court will consider the ban on non-English documents a content-based or content-neutral restriction.

At its purest form, the restriction set forth by the Board staff banning all non-English content in state documents does not necessarily fall into the content-based restriction category. The English-only requirement does not restrict the names or words used on the ballot because of the message those words communicate. In fact, the Board's Voter Information Guide states that "voters who ask for voting assistance due to . . . an inability to read English may request voting assistance at the polls on election day."\textsuperscript{174} In essence, the Board has no desire to restrict the content of the message but rather wants the content to be communicated in any way necessary. As a result, a court will not apply a strict scrutiny standard to this English-only requirement, but will instead apply a much less stringent standard.

The United States Supreme Court has stated that while the government will have a difficult time restricting content, its "cases make equally clear . . . that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted."\textsuperscript{175} As a result, if the Kentucky court were to hold the restriction to be content-neutral, the ban on non-English language documents in the Commonwealth would still fail under intermediate scrutiny.\textsuperscript{176} This level of scrutiny requires a substantial governmental interest, such as savings and efficiency in governmental operations, and a restriction that is no greater than necessary to further that interest.\textsuperscript{177}

The United States Supreme Court has held that "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates

\begin{itemize}
\item \textsuperscript{172} Vieth v. Jubelirer, 541 U.S. 267, 294 (2004).
\item \textsuperscript{173} \textit{Turner Broad. Sys.}, 512 U.S. at 641.
\item \textsuperscript{174} Kentucky: State Board of Elections—Voter Information Guide, \url{http://elect.ky.gov/registrationinfo/infoguide.htm} (last visited Jan. 26, 2010).
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
constitutionality." The Court also held, however, that administrative convenience does bear some importance. As a result, though not sufficient to overcome strict scrutiny review, governmental efficiency and savings could serve as substantial interests that satisfy intermediate scrutiny review and justify a ban on non-English language documents. Kentucky's high court, however, will likely require more than governmental efficiency and savings for the ban to pass intermediate scrutiny review, especially considering the new technologies used in voting equipment. In the past, the Commonwealth's older voting machines would have required switching ballots on voting machines, printing documents in non-English languages, and providing costly translation services. In the electronic age, however, many voting machines have ballots that appear on the screen based on a code number issued at the ballot box. Though they may need to be programmed, the added expense of such programming will likely be minimal. Furthermore, the state does not necessarily have to print these documents for citizens anymore, as the ability to download them onto citizens' home personal computers becomes more available through high-speed Internet access spreading across the country. The translation would cause the government to incur only a one-time fee. The savings and efficiency interest, therefore, would decrease as technology advances.

The second part of the test requiring that the restriction be no greater than is essential to the furtherance of that interest also presents problems for the government. This restriction, if accepted, will require that all government documents, including government bills, court documents, and even documents from schools, libraries, and county hospitals, be printed in English to remain content-neutral. In Lexington, Kentucky, there are a number of bilingual schools that teach in Spanish and Japanese.

179 Id.
180 Seventeen of Kentucky's 120 counties still use the older ELECTronic 1242 voting machine accounting for 455 of the 7069 voting machines in the Commonwealth. Ky. State Bd. of Elections, Voting Equipment Used by Each County (2009), http://www.electky.gov (follow "Voting Equipment by County" hyperlink; follow "here" for a list by machine type hyperlink). The ELECTronic 1242 stands about 6 feet tall and includes a large printout of the ballot on top of a panel of buttons which trigger a light next to the name the voter selects. ELECTronic 1242 Voting System, http://guardianvoting.com/gvs/vs.html (last visited Mar. 2, 2010). One-hundred nineteen of the 120 counties, however, now also use a modern computer-based voting booth that would not require printing separate ballots or switching papers. Ky. State Bd. of Elections, supra.
181 Joelle Tessler, Broadband Goals Won't Be Met Easily; Goal Is to Keep U.S. Competitive, Boston Globe, Mar. 16, 2010, at B18B. The Federal Communications Commission (FCC) has set as its goal "to connect 100 million households at 100 megabits per second—at least 20 times faster than most current home connections—by 2020." Id. Approximately two-thirds of U.S. households currently have access to high-speed Internet. Id.
182 See supra text accompanying note 168.
183 Maxwell Spanish Immersion Magnet Elementary School, http://www.fcps.net/
If the English-only restriction were to be taken seriously, teachers and administrators could not distribute homework copied using government machines and government paper in the language of students who attend those schools. The restriction would also hinder other traditional municipal functions (i.e., libraries, government bills, and court documents), as the government could never send letters in languages understood by the non-English speaking population in an effort to collect taxes or gather information. If a county hospital, likely to serve an indigent non-English speaking community, could not use documents in languages other than English, the government interest in savings and efficiency becomes even more absurd. The emergency room would slow to a crawl while non-English speakers required translators from the staff to help fill out necessary paperwork. The hospital would have to hire more staff to keep the emergency room running efficiently, which inevitably would cost much more than printing a few official government documents in languages other than English.

Under this content-neutral standard, the Commonwealth would not be able to justify a full ban on non-English government documents, including ballots and other election materials. The government interest would arguably rise to the substantial level required for the content-neutral intermediate scrutiny review, but the ban would not likely survive the narrowly tailored requirement of the second prong.

C. Requiring English-Only Violates First Amendment Rights—The Conduct

Consider, as well, a clerk in a more immigrant-friendly county that wishes to offer the service of ballots and registration forms in its citizens’ native languages. While a court would likely not overturn an English-only requirement on its own, a court could view this restriction as a violation of the clerk’s right to provide an invitation to the local immigrant population to better participate in the workings of their government.

The United States Supreme Court has recognized that some conduct looks so much like communication that it is covered by the First Amendment and incorporated to the states via the Fourteenth Amendment.\textsuperscript{[184]} In determining if conduct amounts to speech protected by the United States Constitution, the Court looks at whether “[a]n intent
to convey a particularized message was present,” and whether “in the surrounding circumstances[,] the likelihood was great that the message would be understood by those who viewed it.”\footnote{185} The Court also examines the context of the conduct in determining whether the conduct rises to the level of protected speech.\footnote{186}

If a county clerk wanted to make a statement regarding immigration policies or welcome those who cannot read English to take part in their government, a likely part of this statement would include the use of a non–English language on ballots and other documents. The context of this conduct would ensure that the message is presented loud and clear. As will be explored in Part V of this Note, both the anti–immigration rhetoric and the “English as an official language” movement continue to play a prevalent role in today’s society. Taking the current political climate into account, many Kentuckians could associate a move to add a different language to a county’s ballot almost instantaneously with immigration or welcoming those who cannot speak English to become civically active. In fact, the communication would likely become fodder for conservative talk shows and other conservative media. The intention would be present and the message would be clearly understood.

In much the same way as the Court uses two tests based on content-based and content-neutral restrictions,\footnote{187} the Court applies two tests to expressive conduct based on whether the restriction attempts to ban the free expression itself.\footnote{188} In holding a Texas statute banning flag burning an unconstitutional restriction on the First Amendment, the Supreme Court noted that the statute sought to protect “onlookers from being offended by the ideas expressed by the prohibited activity.”\footnote{189} The Court decided that the statutory evaluation required “the most exacting scrutiny”\footnote{190} and determined that “[w]hether [the defendant’s] treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct.”\footnote{191} If the restriction does not deal with the free expression involved in the conduct, the standard becomes the same as that used for restrictions on content-neutral communication.\footnote{192}

Considering Kentucky’s policy regarding the use of English–only documents, the case will require some showing that the restriction carries

\footnote{185} Id. at 410–11.
\footnote{186} Id. at 410.
\footnote{187} See supra notes 165–73 and accompanying text.
\footnote{189} Id. at 412 n.7.
\footnote{190} Id. at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)) (internal quotation marks omitted).
\footnote{191} Id. at 411.
\footnote{192} See id. at 406–07; see also Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 298 & n.7 (1984).
another purpose besides efficiency in government. This could include xenophobia or political rationales such as uniting the country or keeping Latinos or other language minorities out of the political system. Such a purpose necessarily entails the protection of the public from the expression of an idea of inclusion that may offend them. Kentucky’s legislature showed this motive in House Resolution 242 in 2004, whereby the state House of Representatives urged the United States Congress to adopt English as an official language. The House justified its proposal by stating that the declaration of “English as the official language is essential for uniting Americans[,] . . . U.S. immigrants would be encouraged to learn English[, and] . . . learning English would be beneficial to immigrants.”

Because a restriction must serve substantial state interests in order to overcome careful scrutiny, the present state interests in an English-only restriction will not likely suffice. Efficiency in government, though a legitimate state interest, cannot serve as an interest substantial enough to restrict a fundamental right. If a clerk were to take the actions described above, the English-only requirement for government documents could have a tough time surviving careful scrutiny and a court could find a violation of the First Amendment.

IV. THE BROADER IMPLICATION—LOCAL RESTRICTIONS IN THE FACE OF THE VOTING RIGHTS ACT OF 1965

The above analyses will remain relevant in the present political climate. The English-only movement continues to try to get a foothold in this country in light of the current immigration issue. The non-profit lobbying group English First frames its argument in its symbol, the Statue of Liberty torch, which it says captures “the spirit of immigrants who learned English and became full members of American society.” Put simply, as the immigration debate continues to permeate American society, the push to make English the official language will continue.

Thirty states now have laws requiring their governments to print all materials in English, and as of 2008 nineteen other legislatures were considering similar measures. California, Texas, Florida, Colorado, North Carolina, and New York have all passed constitutional amendments with a large majority. Voters from the city of Nashville, however, voted not to

194 Id.
196 William M. Welch, English–Only Laws Gathering Steam, USA Today, June 19, 2008, at 3A.
197 Id.
require English for all government business. In Kentucky, the city of Inez went the other way, voting to make English its official language in May of 2006. Either way, local governments must take into consideration, before putting the issue on the ballot, what these “mandates” prohibiting the use of other languages will mean when the Hispanic/Latino population crosses the threshold set forth by the Voting Rights Act of 1965. Put differently, these governments could face challenges to their English-only policies based on the Supremacy Clause of the U.S. Constitution, which makes “the Laws of the United States . . . the supreme Law of the Land.”

The Seventh Circuit took up this exact issue in *Puerto Rican Organization for Political Action v. Kusper.* A federal district court in Chicago entered an order for an injunction requiring the Chicago Board of Election Commissioners to provide voting assistance in Spanish to U.S. citizens from Puerto Rico who were unable to read or understand English. In doing so, it required the commissioners to print instructions and other support material in Spanish. It also required bilingual election judges in various precincts in the areas with the most need.

On appeal, the U.S. citizens from Puerto Rico did not argue the refusal of Spanish assistance on its own was unconstitutional, but rather that it conflicted with the Voting Rights Act of 1965. In upholding the injunction, the court held that the district court had jurisdiction to enter the injunction under the Supremacy Clause of the U.S. Constitution. In doing so, the Seventh Circuit compared the plight of Spanish-speaking U.S. citizens to that of African-American voters who were instructed to vote for an African-American candidate in a special election by casting a straight-ticket ballot in Louisiana. Unfortunately, the Louisiana election officials discovered they could not set up the machines to handle the straight-ticket ballot

---

200 Nick Coleman, *English-Only Idea No Es Muy Inteligente,* STAR TRIBUNE (Minneapolis, Minn.), June 18, 2006, at 1B.
201 See supra text accompanying notes 3–5.
202 U.S. CONST. art. VI, cl. 2.
204 *Id.* at 576. The author acknowledges the Voting Rights Act of 1965 does contain an express provision prohibiting the states “from conditioning the right to vote [based on the] ability to read, write, understand, or interpret any matter in the English language” when dealing with Puerto Rican citizens and other citizens “educated in American-flag schools in which the predominant classroom language was other than English.” 42 U.S.C. 1973b(e)(1) (2006). The court’s analysis, however, of the Supremacy Clause in relation to the Voting Rights Act of 1965 appears applicable and will be used in this Note accordingly.
205 *Kusper,* 490 F.2d at 576–77.
206 *Id.* at 577.
207 *Id.* at 578.
208 *Id.*
209 *Id.* at 579–80 (citing United States v. Post, 297 F. Supp. 46 (W.D. La. 1969)).
and a number of voters cast incorrect votes.\textsuperscript{210} A federal court in Louisiana would eventually void the election.\textsuperscript{211} In a similar way, the court in \textit{Kusper} ruled that the Spanish-speaking Puerto Rican has the right to “assistance in the language he can read or understand.”\textsuperscript{212}

The Voting Rights Act, however, covers more than U.S. citizens born in Puerto Rico. Congress has found that “the denial of the right to vote of [language minorities] is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation.”\textsuperscript{213} As a result, Congress has declared that “in order to enforce the guarantees of the [F]ourteenth and [F]ifteenth [A]mendments to the United States Constitution,” states or political subdivisions meeting certain triggers in their population must provide voting materials in languages other than English by 2032.\textsuperscript{214} The statute states that when more than 10,000 voting age citizens of a political subdivision or more than five percent of the voting age citizens of a state or political subdivision are non-English speaking citizens, the state or political subdivision must provide “notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots . . . in the language of the applicable minority group as well as in the English language.”\textsuperscript{215} The Civil Rights Division of the Department of Justice has chosen to enforce the provision with success in recent years.\textsuperscript{216} During the 1990s, the Justice Department obtained orders or consent decrees remedying violations of the Voting Rights Act in three cases.\textsuperscript{217} During the 2000s, that number rose above thirty.\textsuperscript{218}

The principle of federalism will also not act as a shield for English-only provisions. As seen in \textit{Katzenbach v. Morgan}\textsuperscript{219} and \textit{South Carolina v. Katzenbach},\textsuperscript{220} Congress acted rightfully under its Fourteenth and Fifteenth Amendment powers in enacting the Voting Rights Act of 1965, and the Supremacy Clause makes it applicable to the states.\textsuperscript{221} In upholding the specific provision dealing with Puerto Ricans discussed by the Seventh

\begin{thebibliography}{9}
\item \textsuperscript{210} \textit{Id.} at 580 (citing \textit{Post}, 297 F. Supp. at 46).
\item \textsuperscript{211} \textit{Id.} (citing \textit{Post}, 297 F. Supp. at 46).
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textit{Id.} 42 U.S.C. § 1973aa–1a(a) (2006).
\item \textsuperscript{214} \textit{Id.} §§ 1973aa–1a(a) to 1973aa–1a(b)(1).
\item \textsuperscript{215} \textit{Id.} §§ 1973aa–1a(b)(2)(A)(i)(I)–(III) to 1973aa–1a(c). There are, however, limited exceptions to this requirement. \textit{Id.} §§ 1973aa–1a(c) to 1973aa–1a(d).
\item \textsuperscript{216} United States Department of Justice Civil Rights Division Home Page, http://www.justice.gov/crt/voting/litigation/recent203.php (last visited Jan. 31, 2010).
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Katzenbach v. Morgan}, 384 U.S. 641 (1966).
\item \textsuperscript{220} \textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966).
\item \textsuperscript{221} \textit{Morgan}, 384 U.S. at 646–47; \textit{Katzenbach}, 383 U.S. at 325–26.
\end{thebibliography}
Circuit, the United States Supreme Court held this portion of the Voting Rights Act as "prohibit[ing] the State from denying to that community the right that is 'preservative of all rights.'" In so doing, the Court called "[t]his enhanced political power . . . helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." Political subdivisions, however, have begun to argue that the Voting Rights Act of 1965's requirements and restrictions should no longer have effect since the problems of the past have been remedied.

V. THE CONSTITUTIONAL ATTACK ON THE VOTING RIGHTS ACT OF 1965

Within a month of the 2006 renewal of the Voting Rights Act of 1965, the Northwest Austin Municipal Utility District Number One (District) filed a lawsuit challenging the constitutionality of the Act's provisions requiring "preclearance" to change voting practices that mandate ballots and other documents in Spanish. According to the District, Texas fell under the Voting Rights Act of 1965 in 1975 when the United States Attorney General found that election materials were only offered in English, more than five percent of the state’s voting age population spoke Spanish, and less than fifty percent of voting age citizens had voted in the 1972 presidential election. The District alleged that Congress reauthorized the preclearance provision without specifically identifying evidence of current discrimination. Moreover, the District maintained that Texas had remedied the discriminatory conditions which caused the state to be subject to the preclearance provision in the past. The District called the restrictions "both arbitrary and irrational for Congress to continue." The complaint stated, "Times have changed, and § 5, [which mandated the "preclearance" procedure], should now be struck down as

222 Morgan, 384 U.S. at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
223 Id.
226 Complaint, supra note 225, at 2.
227 Id.
228 Id. at 4.
229 Id.
unconstitutional, either on its face, or as applied to the [D]istrict." The District also requested a "bail-out," allowed under section 4 of the Act, from the "preclearance" requirement which would have allowed it to get out of the statutory requirements based on the District's prior compliance with the Act's key provisions in the years prior to the filing of its complaint. The D.C. District Court ruled the statute passed constitutional muster under the stricter Fourteenth Amendment "congruent and proportional" analysis and the less strict Fifteenth Amendment "rationality" standard. The district court also held the bailout provision applied only to counties and parishes that do not register their voters, but not to smaller similarly-situated subdivisions like the municipal utility district.

In June of 2009, the United States Supreme Court reversed and remanded the D.C. District Court's holding by an 8-1 vote. Chief Justice John Roberts wrote for the majority and allowed the District to seek bail-out from the preclearance requirements, but the opinion did "not reach the constitutionality of [the preclearance provision of the Voting Rights Act]." In deciding not to take up the constitutionality of the preclearance requirement, the Court stated, "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." It did, however, spend more than two pages discussing federalism concerns and the constitutionality of the Act.

In another federal constitutional challenge to the Voting Rights Act of 1965 from a racial re-districting case in North Carolina, the Court held in March 2009 that "[i]t is common ground that state election-law requirements . . . may be superseded by federal law—for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution." The Court also acknowledged the following regarding the interpretation of the Voting Rights Act:

[R]acial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal

---

230 Id.
231 Id.
233 Id. at 230-35.
234 Holder, 129 S. Ct. 2504.
235 Id. at 2508.
236 Id. at 2513 (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984)) (internal quotation marks omitted).
237 Id. at 2511-13.
opportunity to share and participate in our democratic processes and traditions; and [the Voting Rights Act] must be interpreted to ensure that continued progress.”

It also held, however, that states have the right to decide how they comply with the Act, warning that “[r]acial classifications with respect to voting carry particular dangers ... [threatening] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”

While the Court acknowledges “the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform,'” it also recognizes that it “will not shrink from [its] duty 'as the bulwark of a limited constitution against legislative encroachments.'” The Court has also openly acknowledged that the preclearance section of the Voting Rights Act of 1965 presents “a difficult constitutional question,” with at least one Justice stating the requirement “exceeds Congress' power to enforce the Fifteenth Amendment.” In other words, with the right case that challenges provisions based solely on constitutionality, the Act may not survive.

As the country continues to make progress toward equal access to the ballot box and government, the question becomes what other requirements could face a similar attack. As stated previously, the mandatory foreign language requirements in the Voting Rights Act of 1965 already face an open attack with states and communities passing English-only requirements in reaction to the immigration debate. Thus, the Voting Rights Act of 1965 could serve as the only protection for non-English speakers, and its validity could prove as difficult a constitutional question as the English-only requirement itself.

**CONCLUSION**—KENTUCKY AND OTHER LOCALITIES SHOULD TAKE GREAT CARE WITH “ENGLISH AS OFFICIAL LANGUAGE” STATUTES

In the end, local governments and non-English speaking citizens could challenge the Board staff’s interpretation regarding a ban on languages other

---

239 Id. at 1249.
240 Id. at 1247 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)) (internal quotations marks omitted).
242 Id. at 2513 (quoting The Federalist No. 78, at 526 (Alexander Hamilton) (J. Cooke ed., 1961)).
243 Id. at 2516.
244 Id. at 2517 (Thomas, J., concurring in part, dissenting in part).
245 See supra Part IV.
than English under the Kentucky Constitution's Bill of Rights and Equal Protection Clause as well as the United States Constitution's Fourteenth Amendment. The result of the challenge, however, could depend on the circumstances these non-English speaking citizens face in the Commonwealth. Despite the stagnant support for non-English speakers, evidenced through the lack of non-English media outlets, a challenge against Kentucky's provision may have a better chance at success in light of the continuous growth in the Spanish-speaking population. A successful challenge against any restriction on the use of non-English languages in official documents, however, may still require help from a willing clerk ready to offer the invitation to participate in government to non-English speakers. Either way, the moment the population reaches the trigger in the Voting Rights Act of 1965, the Board and local governments will have a hard time avoiding the provision requiring voting materials in languages other than English due to the Supremacy Clause and enough citizens being deprived of their right to vote. The ultimate question is whether the Voting Rights Act of 1965, as we presently know it, will still offer protection once Kentucky's political subdivisions reach that benchmark.