

## Case Note

### Measuring Language Rights Along a Spectrum

*Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *cert. granted sub nom. Alexander v. Sandoval*, 68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908).

With the growth of the American Latino and Asian populations during the past decade,<sup>1</sup> questions regarding the legality and societal desirability of English-only measures must soon be resolved at the highest levels of government.<sup>2</sup> Public officials will inevitably make determinations concerning the extent to which individuals possess the right to communicate in their language of best ability.<sup>3</sup> The politically charged discourse over language rights may change direction as a result of the Eleventh Circuit's decision in *Sandoval v. Hagan*.<sup>4</sup> In this case, the court struck down the State of Alabama's English-only driver's license examination because it violated Title VI of the Civil Rights Act of 1964. The decision represents a tangible step forward in the protection of language minority groups. Using *Sandoval* as a point of departure, this Case Note argues that a more functional approach to language discrimination

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1. According to the U.S. Census Bureau, from 1990 to 2000, the nation's Asian and Pacific Islander population increased over 49% to reach 11.16 million, while the Hispanic population increased nearly 50% to reach 32.44 million. See POPULATION DIV., U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE, AND HISPANIC ORIGIN, <http://www.census.gov/population/estimates/nation/intfile3-1.txt> (Aug. 25, 2000).

2. As of April 2000, half of the fifty states had enacted English-only laws, though the impact of each statute has varied. Katherine Kapos, *Ed. Board Demurs on English-Only*, SALT LAKE TRIB., Apr. 12, 2000, at B1, available at 2000 WL 3757810.

3. While there is presently no entitlement to language rights, remedial English programs establish a limited right for members of language minority groups. Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 90 (1992).

4. 197 F.3d 484 (11th Cir. 1999), *cert. granted sub nom. Alexander v. Sandoval*, 68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908). The Supreme Court granted certiorari on grounds not relevant to this Case Note.

requires a judicial incorporation of the widely accepted notion of a language spectrum.

## I

In 1990, the citizens of Alabama ratified an English-only referendum, thereby declaring English Alabama's official language.<sup>5</sup> One year later, the Alabama State Department of Transportation adopted a policy mandating that every part of the driver's license examination, most notably the written portion, be administered only in English.<sup>6</sup> In September 1997, Martha Sandoval was named a representative of a plaintiff class consisting of "all legal residents of the State of Alabama who are otherwise qualified to obtain a . . . private vehicle driver's license but cannot do so because they are not sufficiently fluent in English."<sup>7</sup> After finding adverse economic impact, the U.S. District Court for the Middle District of Alabama held that the English-only driver's license examination was invalid under Title VI of the Civil Rights Act of 1964.<sup>8</sup>

On appeal, the State contended that as a matter of law, an English-only language policy could never have a disparate impact in violation of Title VI's protection against national-origin discrimination.<sup>9</sup> Disagreeing with this contention, Judge Marcus affirmed all of the lower court's findings of law. The court conceded that "existent case law is unclear" on whether language serves as a proxy for national origin for civil rights purposes.<sup>10</sup> To that end, the Eleventh Circuit argued that the issue of whether language serves as such a proxy was "tangential" because this case did not involve a showing of intentional discrimination.<sup>11</sup> Nevertheless, by affirming the finding of disparate impact on non-English speakers, the appellate court effectively legitimated the nexus between language and national origin.<sup>12</sup> In so doing, the Eleventh Circuit became one of only two federal circuit courts to nullify a state-sanctioned English-only provision, and the first court to do so using Title VI.<sup>13</sup>

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5. *Id.* at 488.

6. *Id.*

7. *Id.* (quoting the district court's class certification order of October 17, 1997).

8. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1264 (M.D. Ala. 1998). Title VI prohibits discrimination on the basis of race, color, or national origin in all programs receiving federal funding. 42 U.S.C. § 2000(d) (1994).

9. *Sandoval*, 197 F.3d at 508.

10. *Id.* at 509.

11. *Id.*

12. The court alludes to this in dicta: "[B]oth Supreme Court precedent and longstanding congressional provisions have repeatedly instructed state entities for decades that a nexus exists between language and national origin." *Id.* at 510.

13. In *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 931-34 (9th Cir. 1995) (en banc), vacated as moot and remanded, 520 U.S. 43 (1997), a statute mandating that all

Like most language discrimination claims,<sup>14</sup> the claimants' strategy in *Sandoval* was based on a disparate impact theory of discrimination. Plaintiffs have typically fallen short in their efforts to establish that English-only rules have a disparate impact on language minority groups. The two most influential cases regarding disparate impact, the Fifth Circuit's *Garcia v. Gloor*<sup>15</sup> and the Ninth Circuit's *Garcia v. Spun Steak Co.*,<sup>16</sup> both concluded that workplace language restrictions did not have a disparate impact on Spanish-speaking plaintiffs.<sup>17</sup> These claims were dismissed because both courts relied on the same premise: "[T]he language a person who is multi-lingual elects to speak at a particular time . . . is a matter of choice."<sup>18</sup> *Sandoval*, standing for the proposition that English-only provisions have a disparate impact under national origin laws, stands apart from these decisions.

Although the direct outcome of *Sandoval* is unequivocally positive for a number of language minorities seeking driver's licenses in the State of Alabama, civil rights lawyers reading the opinion will inevitably realize that this case will not become a bedrock for the vindication of language rights. The court of appeals, faced with a factual scenario ripe for an extension of basic rights for all language minorities,<sup>19</sup> chose instead to retain much of the reasoning prevalent in the opinions of its sister circuits. While it did implicitly recognize the connection between language and national origin, which is a position significantly more consistent with linguistic studies than the findings of other courts have been,<sup>20</sup> the *Sandoval* court's passive acceptance of the Ninth and Fifth Circuits' decisions suggests that bilingual persons will continue to have uncertain claims for relief under the civil rights laws.

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government officials "act" only in English was found to violate the First Amendment because the English-only provision was facially overbroad, thus abridging free expression.

14. *E.g.*, Schmid, *supra* note 3, at 80.

15. 618 F.2d 264 (5th Cir. 1980).

16. 998 F.2d 1480 (9th Cir. 1993).

17. Given that *Sandoval* was decided in the context of Title VI of the Civil Rights Act of 1964, it may cause concern that most language cases concern workplace discrimination, thus falling under the ambit of Title VII. However, this Case Note assumes *arguendo* that the term "national origin," found in both titles, has been treated in effectively the same fashion by courts evaluating the merits of cases dealing with federally funded programs and in the workplace. As an example of the interchangeable use of the two provisions, the Eleventh Circuit has explicitly applied Title VII's disparate impact framework to Title VI disparate impact suits. *Sandoval*, 197 F.3d at 507 (citing cases).

18. *Spun Steak*, 998 F.2d at 1487 (quoting *Gloor*, 618 F.2d at 270). Although the Ninth Circuit, in *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), struck down an English-only provision on national origin grounds, the precedential value of *Gutierrez* is minimal because it was decided prior to the *Spun Steak* decision.

19. Alabama continued with the appeal despite actual notice from the state attorney general that the English-only policy violated Title VI. *Sandoval*, 197 F.3d at 499.

20. *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975).

## II

There is a profound connection between language and national origin, which judges have acknowledged to varying degrees.<sup>21</sup> Academics have also argued that the Spanish language is an intractable part of the Latino culture, representing one of the ties of Spanish-speaking persons to their ancestors' or their own place of origin.<sup>22</sup> This experience is not limited to Latinos; the connection is equally strong among other language minority groups.<sup>23</sup> Ultimately, the absence of strong protections for language minorities, given the abundance of evidence substantiating the connection between language and national origin,<sup>24</sup> is cause for concern.

In its decision, the Eleventh Circuit reasoned that *Gloor* and *Spun Steak* were "inapposite" because in those cases, the plaintiffs had the ability to speak English and thus had a viable choice of language.<sup>25</sup> The court emphasized that the "vast" majority of the *Sandoval* plaintiffs were foreign-born persons who had almost no ability to speak English.<sup>26</sup> While it mentioned that the law had a disparate impact on non-English speakers,<sup>27</sup> the court never alluded to the presence of numerous American-born claimants with inherent language difficulties.

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21. See *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (noting that "language . . . should be treated as a surrogate for race" in some circumstances); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995) (en banc) (observing that "language is a close and meaningful proxy for national origin"); *Carino v. Univ. of Okla. Bd. of Regents*, 750 F.2d 815, 818-19 (10th Cir. 1984) (holding that dismissing an employee because of his accent is actionable as national origin discrimination).

22. Wendy Olson, *The Shame of Speaking Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1, 27 (1991); Lisa J. Soto, Note, *The Treatment of the Spanish Language and Latinos in Education in the Southwest, in the Workplace, and in the Jury Selection Process*, 3 HISPANIC L.J. 73, 75 (1997).

23. E.g., Juan F. Perea, *English-Only Rules and the Right To Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 288 (1990) (discussing the presence of mother tongues in America, including Spanish, German, Italian, French, Polish, and Yiddish); Edward M. Chen, Case Note, *Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism*, 1 ASIAN L.J. 155, 187 (1994) (mentioning the impact of English-only laws on Asian-Pacific Islanders).

24. E.g., Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 359 (1992) (citing EEOC regulations and statistical findings in support of the nexus between language and national origin); Aileen Maria Ugalde, Comment, "*No Se Habla Español*": *English-Only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209, 1209 (1996) (arguing that a person's place of national origin "almost invariably dictates" choice of language).

25. *Sandoval*, 197 F.3d at 499. The court of appeals also attempted to distinguish this case because it did not involve employment discrimination, which is partly disingenuous considering that it has openly applied the Title VII analytical scheme to evaluate this and other Title VI decisions.

26. *Id.* at 489 (citing *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1283 (M.D. Ala. 1998)). The court chose two plaintiffs out of hundreds to support its finding. The opinion refers to Martha Sandoval, a permanent resident from Mexico who understood very little English and was unable to read English, and Lorenzo Leon, who was also born in Mexico and was extremely limited in his ability to speak and understand English. *Id.* at 490.

27. *Id.* at 509.

Under such analysis, the complete “spectrum of language competence,”<sup>28</sup> a spectrum including countless citizens with multiple levels of English language comprehension, is left virtually without a claim for relief. It ranges from “minimal conversation skills to complete fluency in two languages.”<sup>29</sup> William F. Mackey, an expert in the field of linguistics, reasons that the language spectrum exists because a bilingual person’s ethnic identity never completely disappears just because it assimilates into the mainstream.<sup>30</sup> Supporting this notion, Knapp writes that “[s]ome Hispanics may be newly arrived immigrants who are only marginally able to converse in English; some may, having grown up in the United States, call English their native tongue; and others may find themselves somewhere in the middle of that broad spectrum.”<sup>31</sup>

Writing on the subject of language minorities, a number of academics have integrated the language spectrum into their reasoning,<sup>32</sup> suggesting that one’s position on the spectrum has a particular influence on a person’s livelihood. This is because a person’s primary language remains such throughout his lifetime. No matter how much many adults try, they are incapable of learning English at the same level as their primary language. In this sense, language is, as scholar Juan Perea has observed, a “practically immutable” characteristic, akin to sex or race.<sup>33</sup> As a result, the adverse implications of language discrimination are quite profound.<sup>34</sup>

The idea of linguistic abilities as an all-inclusive spectrum is not restricted to scholarly articles. The Supreme Court and other federal courts have relied on the notion of a language spectrum. In *Hernandez v. New York*,<sup>35</sup> borrowing from modern commentary studying language aptitude

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28. Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747, 773 (1997). Linguistics studies have long supported this notion of a language spectrum. E.g., William F. Mackey, *The Description of Bilingualism*, in READINGS IN THE SOCIOLOGY OF LANGUAGE 554 (Joshua A. Fishman ed., 1968) (reasoning that the concept of bilingualism has grown broader as academics have begun to understand that bilingual abilities function on a spectrum). For more in-depth discussions of language acquisition, see, for example, ALEJANDRO PORTES & ROBERT L. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* (1985); and John H. Schumann, *Second Language Acquisition: The Pidginization Hypothesis*, in SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS 256, 256-71 (Evelyn Marcussen Hatch ed., 1978).

29. Knapp, *supra* note 28, at 773.

30. Mackey, *supra* note 28, at 557-68.

31. Knapp, *supra* note 28, at 762.

32. *Id.*; Perea, *supra* note 23, at 292; Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 595 (1998).

33. See Perea, *supra* note 23, at 279-87.

34. See Olson, *supra* note 22, at 27 (arguing that English-only laws place a badge of inferiority on Spanish-speaking persons).

35. 500 U.S. 352 (1991). *Hernandez* involved a race-based discrimination claim as opposed to a national origin claim. The intermingling of race and national origin claims points to the confusion that occurs when the terms are used as substitutes for one another. Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title*

among persons with both Spanish and English skills, Justice Kennedy reasoned that the term “bilingual” is “a simple word for a more complex phenomenon with many distinct categories and subdivisions.”<sup>36</sup> Another federal court has recognized that there is particular variation for degrees of language fluency.<sup>37</sup> These cases indicate that it is possible for judges to arrive at an understanding of the sociological complexity of bilingualism.

Comparing *Gloor* and *Spun Steak* illustrates the vast protection gap that courts have created in the language cases. At one extreme, national origin protection is not for the bilingual, that is, according to *Gloor* and *Spun Steak*, those nominally having a choice of language. At the other extreme lies *Sandoval*, which permits coverage for those who have no English abilities whatsoever. The most disconcerting reading of *Sandoval* would limit its scope of language protection to only those persons with no English abilities, leaving outside its ambit the spectrum of partial English speakers. For these language minorities within the spectrum, whether born in the United States or not, *Sandoval*'s nexus between language and national origin offers no solace.

### III

Given the need to provide protection to persons along this spectrum of linguistic abilities, several scholars in the field of language rights conclude that the text of the civil rights laws should be legislatively altered. It has been suggested that the statute be amended to incorporate a distinct category for ethnicity<sup>38</sup> or that the law be changed to make language an explicit subcategory under the national origin rubric.<sup>39</sup> Implementing separate statutory categories for ethnicity and language, although it would answer the current difficulties associated with not recognizing language as a spectrum, is quite unlikely to take place, considering the potent political forces favoring official English laws at both the state and national levels.

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*VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 1347 (1998), criticizes this comingling of race and national origin, arguing that they should be interpreted as separate entities.

36. *Hernandez*, 500 U.S. at 370. *Hernandez* recognized the complicated nature of bilingualism, despite its holding that striking jury members on the basis of their Spanish abilities was not an equal protection violation.

37. *Cota v. Tuscon Police Dep't*, 783 F. Supp. 458, 462 (D. Ariz. 1992) (“[N]ot all Hispanics speak Spanish with the same degree of fluency.”).

38. Knapp, *supra* note 28, at 779-84; Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 860-61 (1994).

39. Soto, *supra* note 22, at 75; *see also* Behm, *supra* note 32, at 605-06 (proposing a separate language discrimination act); *cf.* Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1169-76 (1985) (offering a solution focusing primarily on the protection of ethnic traits).

Congressional amendment of the civil rights laws may require an upheaval of political forces that is not foreseeable in the near future.<sup>40</sup>

Given what is known about language acquisition, a slight adjustment to the jurisprudential practice of Title VI interpretation would be the appropriate means to implement the statute as it currently stands. With the recognition that there exist various levels of linguistic abilities, judges can reasonably presume that those persons lowest on the spectrum of linguistic abilities should be afforded greater protection under the law. I call this proposed model a “sliding scale for the language spectrum.” This methodology would protect language minorities on a sliding scale by assuming that people with lesser English skills are most in need of protection from discrimination on the basis of national origin.

Under such a method of judicial analysis, the presumption of protection would cover persons with limited English proficiency entirely independent of nation of birth. The incorporation of native-born persons with foreign ancestry into the fabric of national origin protection is not without precedent. Supreme Court doctrine, originating in *Lau v. Nichols*,<sup>41</sup> which held that children of Chinese ancestry had a national origin cause of action under Title VI, and *Espinoza v. Farah Manufacturing Co.*,<sup>42</sup> which, reasoning from the legislative history of the civil rights law, stated that “national origin and ancestry are considered synonymous,”<sup>43</sup> suggests that courts have extended and will continue to extend protection to native-born individuals under the national origin prong of Title VI.

This proposed means of interpretation is quite familiar in federal jurisprudence, as sliding scales are often employed by courts.<sup>44</sup> Adherence to a sliding scale continuum is not unfamiliar to legal tradition; it facilitates a certain relationship to the principle of treating like cases alike in order to reach a decision that coincides with the rule of law. The Eleventh Circuit’s reasoning in *Sandoval*, combined with the Fifth and Ninth Circuits’

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40. Language minority groups are a classic example of a discrete and insular minority, according to the rationale of *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). Such minorities lack the political power to sway any vote of the legislature. *Cf. Smothers v. Benitez*, 806 F. Supp. 299 (D.P.R. 1992) (citing *Carolene Products* in a language discrimination case).

41. 414 U.S. 563 (1974).

42. 414 U.S. 86, 88-89 (1973); *see also, e.g., Barnett v. Tech. Int’l, Inc.*, 1 F. Supp. 2d 572, 577 (E.D. Va. 1998) (quoting *Espinoza*). Although *Espinoza* was decided in the employment context, its holding has similar implications for national origin review under Title VI because the statutes have been interpreted in a parallel manner in a number of decisions, including *Sandoval*.

43. *Espinoza*, 414 U.S. at 89.

44. Courts continue to apply a sliding scale mode of analysis when grappling with a variety of legal issues in both civil and criminal law. *See generally Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1243 n.8 (D.N.M. 2000) (“A number of courts and Supreme Court Justices have advocated the use of a sliding-scale or balancing type of analysis for substantive-due-process cases involving liberty interests that are constitutionally protected, but do not rise to the level of fundamental interests deserving the protection of strict scrutiny.”).

holdings in the other language rights decisions, illustrates a current trend in national origin jurisprudence. Non-English speakers are afforded protection by the civil rights statutes while all other parties are flatly excluded. The significance of this trend is that it treats *unlike* cases alike, unjustly lumping fully bilingual persons with those who have only basic communication skills in secondary languages. Doctrinal integration of a sliding scale into the language rights decisions would better evaluate the merits of claimants' cases based on their relative position on the spectrum of linguistic abilities, assuring fair and certain treatment.

Under this interpretation, an individualized, case-by case determination of the level of protection would assure that those with English language difficulties would not be disallowed protection simply because they were born in the United States. While foreign-born persons with no English abilities are protected under *Sandoval*, a sliding scale approach takes one step forward and applies Title VI to foreign-born and native-born individuals with minimal English skills. Thus, one's level of language ability under this system would be a primary determinant of the amount of protection that one would receive under the national origin prong.

#### IV

*Sandoval* is an important decision because it effectively reinforced the nexus between language and national origin. Understanding that language discrimination is not limited only to foreign-born individuals requires a careful reconsideration of what constitutes national origin under the law. A reasonable next step after *Sandoval* would be to incorporate the language spectrum into the fabric of civil rights jurisprudence. The proposed sliding scale approach would not demand an act of a dilatory Congress or an upheaval of longstanding case law. Such an approach truly appreciates the nexus between language and national origin, as well as the existence of a plethora of individuals along the language spectrum. Conceivably, the incorporation of the sliding scale for language would extend protection under the civil rights law to more persons, while at the same time providing a judge the means to measure the tenability of a plaintiff's civil rights claims.

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