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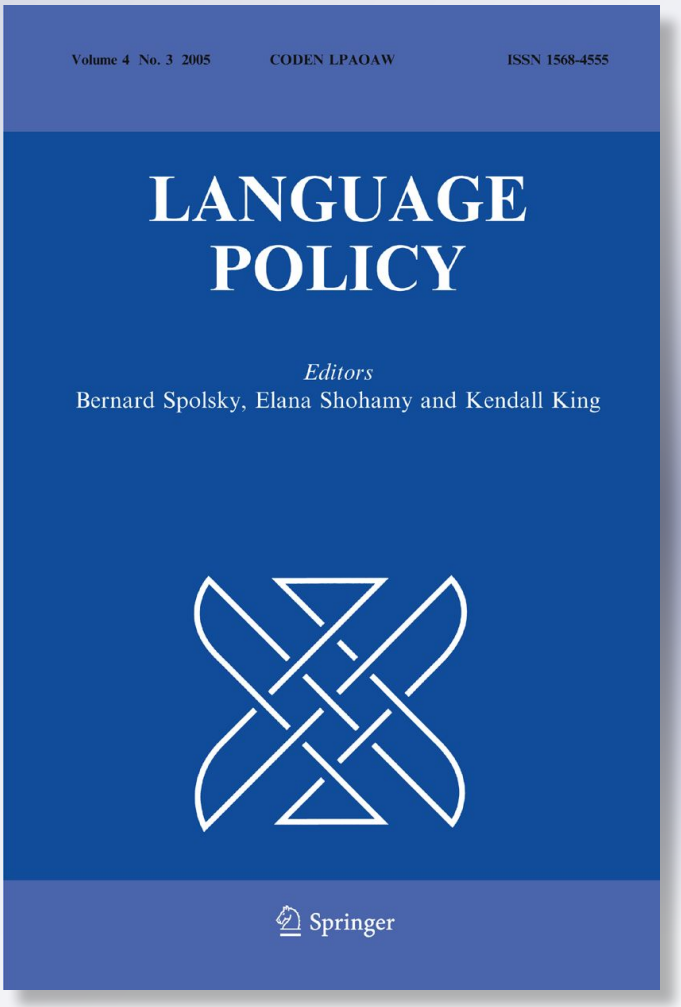

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COMMENTARY

The language policy of state drivers' license testing: expediency, symbolism, or creeping incrementalism?

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Until recently, educational language policy in the US has been the chief site of contention about language, as seen in recent initiatives, referenda, and state constitutional amendments. Provision for drivers' licensing testing in languages other than English (LotE), on the other hand, has often exemplified what we call expedient language policy, i.e. using a LotE for a higher end, that of ensuring highway safety and enhancing opportunities (freedom of travel, especially for economic benefits, i.e. work). In some states, however, notably an Alabama case *Alexander v. Sandoval*, language policy of vehicle licensing has become symbolic of other issues, and the ACLU is now pitted against the National Review, the English-Only and English-First organizations, as well as disability-rights organizations, many of whom have provided amicus curae briefs, all of which seems at first glance out of proportion to the importance of the issue at hand. Between the time this paper was proposed and the present, the Supreme Court has heard this case and found in favor of the state of Alabama and against the parties to the original suit. (The court heard *Alexander v. Sandoval* No. 99-1908 on January 16, 2001, and issued its opinion, for Alexander, on April 24, 2001.)

Keywords English-only · Incrementalism · Impermissible disparate impact · Sandoval · States' rights

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When the Taxpayer and Citizen Protection Act, Law HB 56, was signed into law in Alabama in 2011, it was condemned by many immigrant and civil rights groups as the harshest anti-immigrant law in the nation.[1] Critics claim that HB 56 deters children from going to school, denies people public housing to which they are entitled, and interferes with their ability to rent housing, earn a living and enter into contracts. It requires state and local police officers to detain and investigate people based on a "suspicion" that they may be undocumented immigrants and creates new immigration-related crimes with severe penalties attached. It even authorizes the Alabama Department of Homeland Security to hire and maintain its own immigration police force.[2] We believe that, in some ways, the Alabama legislature felt empowered to enact these draconian immigration laws as a result of the United States Supreme Court's decision in *Alexander v. Sandoval* in 2001.

Background of the case

The case of *Alexander v. Sandoval* began in 1996, when Martha Sandoval, who was born in Mexico and had limited-English proficiency, went to take a drivers' license test in Alabama. Previous to 1991, Alabama had administered the written part of the driver's exam in 14 different languages, including Spanish, Korean, Farsi, Cambodian, German, Laotian, Greek, Arabic, French, Japanese, Polish, Thai and Vietnamese. In 1990, Alabama had amended its constitution to make English its official language, and the drivers' licensing rules were then changed, the interpretation having been made that the officialization of English (Amendment 509) required this change. Sandoval was unable to take the written test in Spanish, and would have failed the English version, so she continued to drive without a license, which occasioned a number of arrests. The Southern Poverty Law Center then took up the case as part of a federal class-action suit of the more than 24,000 non-English-speaking residents of Alabama, alleging that

> "the state violated federal law by requiring applicants for drivers' licenses to take the written examination in English." The particular federal law that supported this lawsuit is known as Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000(d)). Title VI prohibits discrimination grounded in race, color or national origin. (Welner 2001)

Since the State of Alabama receives and administers federal highway monies through its Department of Public Safety, it is forbidden to discriminate against persons on the basis of, among other things, national origin. The federal court ruled that the English-only policy had none of the legitimate justifications claimed by the state, but rather that

[1] See Hing (2011).

[2] See Preliminary Analysis of HB 56 "Alabama Taxpayer and Citizen Protection Act," American Civil Liberties Union Immigrants' Rights Project.

> the regulation had impermissible disparate impact on the basis of national origin in violation of Title VI, and was not supported by substantial legitimate justification.

It is the issue of *impermissible disparate impact* that is perhaps the most important judicial issue here, since though the state of Alabama argued that there was no **intention** to discriminate against persons on the basis of national origin, nevertheless the *unintended* discrimination constituted *impermissible disparate impact*. Various sources have pointed out that though the Civil Rights Act of 1964 in its Title VI does not mention language rights, federal *regulations*

> implementing Title VI, pursuant to § 602 of the statute, have been consistently given a broader interpretation […]. Lawsuits grounded in these implementing regulations are unique in that they allow people like Ms. Sandoval to make their arguments in federal court by showing the discriminatory effect ("disparate impact") of a law. (Welner 2001:3)

The crucial issue, then is *disparate impact* or *unintentional discrimination* and whether the law is required to protect individuals against this, and whether private individuals have a right to sue the state for discrimination under Title VI of the Civil Rights Act, even if the state can offer a legitimate non-discriminatory reason for a regulation or law. The Eleventh Amendment of the U.S. Constitution, which sets out conditions affecting separation of powers, is also crucial in determining whether individuals may sue in certain cases.

The federal court hearing the class action suit ruled against Alabama, finding that the English-only policy did discriminate against non-English speaking applicants, and without substantial legitimate justifications. In November, 1999, the 11th Court of Appeals (197 F.3d 484) affirmed the federal court decision, holding

> that [Sandoval's] suit is not barred under the Eleventh Amendment, that Section 602 of Title VI creates an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination against statutorily protected groups, and that the district court did not err in deciding, on the merits, that the [State of Alabama's] English-only official policy constituted a disparate impact on the basis of national origin. (Hoops 2001:3)

The implications of this act, both for non-English speaking persons, and for other classes of individuals, even citizens, who may have handicaps, who speak English but are illiterate or deaf, as well as disability issues in other types of disputes, are enormous. Part of the irony of this issue is that the State of Alabama already provides accommodations for deaf people, to persons with disabilities, and those lacking formal literacy skills, but denies non-English speaking people the right to use a dictionary or an interpreter. Moreover, Alabama permitted non-English speaking drivers from other states and foreign countries to exchange a valid license from those jurisdictions for an Alabama license without taking the written examination. Thus, the argument that drivers in Alabama need to be able to *read*

English (other than road signs, which in any case now increasingly use international icons) in order to function legally on Alabama roads is not convincing.

The Supreme Court's decision

The US Supreme Court explained that Section 601 of Title VI of the Civil Rights Act of 1964 prohibits recipients of federal grants from engaging in intentional discrimination based upon an individual's race, color or national origin,[3] and that Section 602 of Title VI requires federal agencies responsible for these grants to adopt regulations that implement the provisions of Section 601.[4] It analyzed the issue of whether private individuals have the right to sue to enforce disparate impact regulations under Section 602 of Title VI.[5] It restricted its analysis to this singular issue, noting that "we agreed to review only the question … whether there is a private right of action to enforce the [disparate impact] regulation."[6]

In its decision, the Supreme Court discussed two principles which the Justices believed had already been established as a matter of law: (1) Section 601 of Title VI prohibits intentional discrimination by recipients of federal grants and (2) private individuals who believe that they are victims of intentional discrimination have the right to sue the recipients of federal grants directly to enforce their rights under Section 601.[7] Turning its attention to whether private individuals have the right to sue recipients of federal grants to enforce the disparate impact regulations of Section 602, the Supreme Court focused on the holdings of its previous cases rather than the statements that it had made in those cases.[8] As Justice Scalia explained, "[T]his Court is bound by holdings, not language."[9] By doing so, the Supreme Court took a narrow view of the issue and concluded that private individuals had no right to enforce disparate impact regulations under Section 602.[10] It found no clear Congressional intent to create a private cause of action to enforce the regulations.[11] It reasoned that Title VI prohibited only intentional discrimination and that since the regulations that forbade disparate impact discrimination under Section 602 extended beyond Title VI's prohibition against intentional discrimination, Sandoval

[3] See 42 U.S.C. § 2000d (2000); see also Laufer, John Arthur, "*Alexander v. Sandoval* and Its Implications for Disparate Impact Regimes," 102 Colum. L. Rev. 1613 (2002).

[4] *Id.* § 2000d-1; *id.* at 1613.

[5] *Id.* at 1622.

[6] *Id.* at 1627; see also *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

[7] *Id.* at 1628; see also *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001).

[8] See Miller, Tanya L., "*Alexander v. Sandoval* and the Incredible Disappearing Cause of Action," 51 Cath. U. L. Rev. 1393, 1416–1417 (2001–2002); see also *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

[9] *Id.* at 282.

[10] See "*Alexander v. Sandoval* and the Incredible Disappearing Cause of Action," 51 Cath. U. L. Rev. 1393, 1427 (2001–2002).

[11] *Id.* at 1412; see also *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001).

could not directly enforce the regulations without a Congressional mandate.[12] Finding no such Congressional mandate, the Supreme Court held in favor of the State of Alabama's right to offer the State's driving tests in the English language only.

The consequences of the Supreme Court decision in *Sandoval v. Alexander* are far-reaching. If private individuals cannot prove intentional discrimination, then they cannot sue under Title VI or its regulations, even if they can show that the conduct of a recipient of federal funds has discriminatory impact.[13] As a result, only US federal agencies are able to enforce the regulations under Section 602 which prohibit disparate impact discrimination.[14] This is of particular importance in the field of public education, which prior to the decision in *Sandoval v. Alexander*, relied on Title VI and the disparate impact regulations to protect minority students from discrimination[15] in areas such as state standardized tests.[16] Without a private cause of action to challenge disparate impact discrimination in the courts, protecting students from anything short of flagrant discrimination becomes nearly impossible.[17]

Folk ideas about language and language policy generated by the *Sandoval* case

The other issue we wanted to examine here is the issue of popular-culture ideas about language and what the case of *Alexander v. Sandoval* has stimulated in terms of public discussion. A typical example is Hakola (2001), from the "Center for American Unity" based in Warronton, Virginia. Hakola's statement was issued before the Supreme Court ruled, so her statement is a kind of warning of the dire consequences that would befall the nation if the court were to find for Sandoval. Her metaphors include:

- Our English language is the *defining characteristic* of our great nation.
- Our English language is the attribute that *distinguishes us as Americans*
- Our English language provides the nation with a *sense of unity and common direction*.
- Our language allows us to communicate and share ideas, but also *continuously reminds us that we are Americans* with a common desire to see our nation prosper.
- English provides the *fabric* that unites this land of individuals as a country.
- The English language is the *bulwark* of our national unity.

[12] *Id.* at 1412; see also *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

[13] See Kimmel, Adele P.; Epstein, Rebecca; and Ferraro, James L., "The *Sandoval* decision and its implications for future civil rights enforcement," *Florida Bar Journal*, LXXVI, No. 1/24.

[14] See "*Alexander v. Sandoval* and Its Implications for Disparate Impact Regimes," 102 Colum. L. Rev. 1613, 1622–1623 (2002).

[15] See "*Alexander v. Sandoval* and the Incredible Disappearing Cause of Action," 51 Cath. U. L. Rev. 1393, 1419 (2001–2002).

[16] *Id.* at 1419–1420; see, e.g., *Larry P. v. Riles*, 793 F.2d 969, 972 (9th Cir. 1984).

[17] *Id.* at 1420.

If the court were to rule for Sandoval, however, it would give legal force to the proposition that

> … if a state does not provide services in *any* language a person demands, the state has unlawfully discriminated on the basis of national origin. [emphasis ours, Schiffman and Weiner]

Furthermore, according to Hakola,

- Bilingual education has failed.
- Teaching in English succeeds.
- Federal agencies (such as the Equal Employment Opportunity Commission) continue aggressive attacks on successful English-language policies (by attacking employers who require English on the job).

Another predictable set of notions about this case were expressed by Jim Boulet Jr. (2001), executive director of English First, on the morning after the Supreme Court decision. Mr. Boulet described the decision as a "chilling reminder of the slender threads" which the "shreds" of our national linguistic unity hang from, since the court came with one vote of making "language choice a protected civil right" and transforming every trial lawyer's office into a "miniature federal law-enforcement agency." That is, deciding for Sandoval would have meant a flood of lawsuits demanding services in a manner that does not discriminate against non-English speakers, which would have meant a "linguistic nightmare" for this country.

Or, for another opinion, this one garnered from a chat-line labeled only "Upstream Vdare's Scott McDonnell", by a Robert L. Gleiser, on January 18, 2001:

> "Her [Sandoval's] victory threatens the entire edifice of law and custom *pushing new immigrants to learn English."* [emphasis ours, Schiffman and Weiner]

What these metaphors seem to have in common is the following:

- The English language is the *primary* uniting force holding together our nation. Without it, we are doomed to inundations, floods, lawsuits, and other depredations.
- Allowing private parties to sue the federal government under the Civil Rights Act of 1964 would cause havoc (floods of lawsuits etc). In fact, any expansion or liberalization of language rights would be *chaotic*.
- Law and custom are *causative* in forcing immigrants to learn English; without law, immigrants will not learn English (and economic determinism is without value.)
- Civil Rights have nothing to do with language, and language is not a "proxy" for discrimination on the basis of national origin.
- English is a "fabric, bulwark, a strength; a unifying force" and weakening this edifice goes against "common-sense" ideas of the people and how they wish to govern themselves.

- A decision in favor of Sandoval would be a "judicial fiat" that would result in tyranny (whereas a decision against Sandoval would be commonsensical, and in favor of democracy.)
- Returning Alabama to its pre-1991 multilingual testing status will "increase the public safety risk to Alabama motorists" and cost more.

Epilogue: the *Sandoval* case ten years later

So what has happened in Alabama since the Supreme Court decision in 2001? Why didn't Alabama return to its English-only policy, since the Supreme Court did not uphold the right to multiple-language testing? Various reports and stories in Alabama newspapers reveal that the issue is more complicated and nuanced than it might seem.

Recently, a reporter named Kris Tway, writing on a website called "The World Around You" which is devoted to "Alabama Politics Analyzed for your Protection" explained the situation in an article entitled "Tim James might want to learn the history of English-only drivers license examinations in Alabama (2010)." This was in response to a demand by a politician named Tim James who was unable to understand why Alabama had not returned to an English-only policy for drivers' license testing. Tway pointed out that

> Governor Riley (who has been a consistent supporter of English as the official state language) has maintained that based on the US Supreme Court ruling in Sandoval, returning to an English-only driver's license examination would put our federal transportation dollars in jeopardy. That didn't satisfy some who had fought hard for the English-only constitutional amendment and they sued in 2005 saying the state was violating this amendment by offering the written exam in multiple languages. The Alabama Supreme Court (also in a 5-4 decision) ruled against the English-only advocates and said the state was not in violation of the amendment. Another lawsuit was filed in 2008 and is still pending.
>
> So, apparently, Tim James disagrees with our current governor, and is willing to put billions of dollars at risk to "save" some undetermined amount because he's a smart businessman? Does that make sense to you? (Tway 2010)

And as others have pointed out earlier, the English-only policy on drivers licensing assumes that it will put a stop to illegal immigration, but in fact, illegal immigrants in Alabama are not allowed to even *apply* for drivers' licenses, so in some ways, the policy may be a 'proxy' for taking a stand on illegal immigration, even if it has no effect. In another article published in 2007, John Ehinger (2007), writing for the Huntsville Times, expressed the facts of this quite clearly, concluding with the statement that "Illegal immigration is one issue. Driver's license tests are another issue altogether." As a number of articles have pointed out, Martha Sandoval, who was arrested several times for driving without a license, and whose case went to the Supreme Court, was an American citizen, even though her English was not proficient enough to pass the English-only test, so using the policy

to control illegal immigration would have had no effect. Add to this the fact that lawsuits such as *Alexander v. Sandoval* cost Alabama millions in legal fees[18] and that the English-only policy could have led to the loss of federal highway dollars, most of the articles that have appeared on this topic since the Supreme Court decision have pointed out that a return to English-only would not accomplish any of the goals its advocates espouse.

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[18] Flynn, Sheila in an article published May 17, 2005 on www.datelinealabama.com entitled "Suit: state should offer driver's license exams only in English."