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## Consumer Protection for Latinos: Overcoming Language Fraud and English Only in the Marketplace

Steven W. Bender

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# ARTICLES

## CONSUMER PROTECTION FOR LATINOS: OVERCOMING LANGUAGE FRAUD AND ENGLISH-ONLY IN THE MARKETPLACE

STEVEN W. BENDER\*

### THE X IN MY NAME

the poor  
signature  
of my illiterate  
and peasant  
self  
giving away  
all rights  
in a deceiving  
contract for life<sup>1</sup>

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## INTRODUCTION

American law has little patience for immigrants who arrive unable to understand English.<sup>2</sup> These immigrants face, at best, spotty accommodation of their language barrier: translation in the criminal courtroom,<sup>3</sup> the voting booth,<sup>4</sup> and the classroom<sup>5</sup> is usually assured, but availability elsewhere varies. As consumers, immigrants unable to understand English are left largely to the morals of the marketplace. Existing consumer protection regulation too often assumes that consumers are proficient in English or, if not, are accompanied in

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2. Generally, applicants for naturalization as U.S. citizens must demonstrate that they can read, write, and speak simple English. 8 U.S.C. § 1423 (1994).

3. *Cf.* United States *ex rel.* Negron v. New York, 434 F.2d 386, 391 (2d Cir. 1970) (finding that both Sixth Amendment and "simple humaneness" require that state provide translator for non-English speaking criminal defendant); *see also* Tejeda-Mata v. Immigration and Naturalization Service, 626 F.2d 721, 726 (9th Cir. 1980) (finding that trial judge abused discretion by not allowing simultaneous translation into Spanish of testimony offered against defendant in deportation hearing); United States v. Mosquera, 816 F. Supp. 168, 175 (E.D.N.Y. 1993) (requiring translation of court documents for non-English speaking criminal defendants in order to allow "meaningful access to relevant documents"). For a discussion of the effect of language barriers on the need for knowing and intelligent waiver of Miranda rights, *see* Linda Friedman Ramirez et al., *When Language Is a Barrier to Justice*, CRIM. JUST., Summer 1994, at 2. In contrast, the California Supreme Court found no constitutional basis for a state supplied translator in civil proceedings. *Jara v. Municipal Court*, 578 P.2d 94, 96 (Cal. 1978), *cert. denied*, 439 U.S. 1067 (1979).

4. *See* 42 U.S.C. § 1973aa-1a(b)(2) (1994); *see also infra* note 201.

5. *See* *Lau v. Nichols*, 414 U.S. 563, 566-69 (1974) (holding that failure of San Francisco school system to provide English language instruction to students of Chinese ancestry who do not speak English violates Civil Rights Act of 1964). For a discussion of bilingual education, *see* generally Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249 (1988).

their transactions by an interpreter. Sadly, this gap in protection has made some Latinos/as<sup>6</sup> and other language minorities the victims of choice for unscrupulous merchants who prey on their inability to understand the terms of the bargain.<sup>7</sup>

Non-English-speaking consumers deserve the same protection as other consumers, and thus, this Article advocates guarantees for their ability to strike informed bargains. To safeguard consumers most vulnerable to unfair and deceptive trade practices, this Article contemplates a comprehensive strategy of reform that involves the legislatures, administrative agencies, and courts, as well as nonprofit organizations that advocate for language minorities and merchants themselves. Part I examines the growth in numbers of monolingual Latino/a consumers and documents their experience in the American marketplace. Part I also explores the shortcomings of existing remedies under the common law and consumer protection regulation when applied to non-English-speaking consumers. Part II details potential obstacles to establishing effective consumer protection for Latinos/as and other language minorities. Most significant are the English language movement's repeated calls for a "sink or swim" standard for language minorities in settings ranging from the classroom to the voting booth. The anti-immigrant climate that spawned California's Proposition 187 may also impede reform efforts. Part III proposes reforms to common law remedies and to statutory consumer protection to place more responsibility on businesses when they deal with language minority consumers. Part III also provides a model of self-regulation for merchants who desire to accommodate these consumers. Finally, the Article revisits President Kennedy's consumer "bill of rights" from the point of view of Latino/a consumers.

Due to the large number of monolingual Spanish-speaking Latinos/as in the American marketplace, this Article focuses on these

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6. The term Latino/a is meant to refer to all persons with ancestry in Spanish-speaking countries. Unless used in source material, this Article does not employ the "Hispanic" designation because of its controversial implications. See generally RODOLFO AGUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS ix-xii (3d ed. 1988) (describing Hispanic label as return to philosophy of Mexican positivists at turn of this century who wanted to purge indigenous Mexicans and convert Mexico into European Spanish nation). Latino/a is intended to include those persons with ancestry in countries that are commonly thought of as Spanish-speaking, but whose native languages are indigenous. See *infra* notes 231-34 and accompanying text (discussing diversity of languages among Latinos/as). The differences among the various statutory definitions of the Latino/a people reflect this diversity of languages and of cultures. See Lisette E. Simon, Comment, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 508-10 (1994) (describing range of state and federal definitions of "Hispanic").

7. For examples of such practices, see *infra* Part I.B.

consumers. Much of the analysis and proposed reforms, however, extend to other language minority groups.<sup>8</sup>

## I. MONOLINGUAL LATINO/A CONSUMERS: GROWTH IN NUMBERS AND ABUSES

### A. *Latino/a Demographics and Language Abilities*

America's immigrant population constitutes the largest "of any society in world history."<sup>9</sup> Immigrants from Mexico represent the largest single group, comprising over twenty-seven percent of all immigrants.<sup>10</sup> Immigration from Mexico has itself been described as constituting "the greatest migration of people in the history of humanity."<sup>11</sup> When coupled with Latino/a immigrants from countries other than Mexico and with Latinos/as born here, the total Latino/a population in America as reported by 1994 census data is twenty-seven million.<sup>12</sup> The actual number today is even larger; not only has the Latino/a population grown since 1994, but census figures do not accurately reflect the substantial undocumented Latino/a immigrant population or the Latino/a population generally.<sup>13</sup>

8. Although the federal Voting Rights Act protects only language minorities who are also members of certain specified racial and ethnic minority groups, see *infra* note 201, the proposals in this Article can extend beyond members of minority groups. See *infra* note 197 and accompanying text (discussing census statistics that report French, German, and Italian as most common languages spoken in American homes after English and Spanish).

9. Paul Raeburn, *Americanization Found to Reduce Immigrant Student's Performance*, L.A. DAILY NEWS, Feb. 23, 1994, at N12 (commenting on 1990 census figure of 19.8 million immigrants). Census figures released in 1995 reported the number of immigrants had reached 22.6 million in 1994, the highest proportion of America's population since World War II. See Spencer Rich, *U.S. Immigrant Population at Postwar High*, WASH. POST, Aug. 29, 1995, at A1 (noting that current proportion of foreign-born population is nearly double that in 1970).

10. Rich, *supra* note 9, at A1 (noting that immigrants from Mexico comprise more than 6.2 of 22.6 million immigrants).

11. MARILYN P. DAVIS, MEXICAN VOICES/AMERICAN DREAMS 4 (1990).

12. BUREAU OF THE CENSUS, U.S. DEPT' OF COMMERCE, THE NATION'S HISPANIC POPULATION—1994 (1995) (stating that in 1994, there were 27 million Hispanics in United States, and projecting Hispanic population of 31 million by 2000 and 88 million by 2050).

13. The Census Bureau itself estimates its 1990 census undercounted Latinos/as by 5.2%. 56 Fed. Reg. 33,582 (1991). An official from the Mexican American Legal Defense and Educational Fund suggested that fear of immigration officials and the lack of bilingual census takers led to the undercount of Latinos/as. See Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 266 n.229 (1992) (stating that efforts of Immigration and Naturalization Service to discover and deport undocumented immigrants deter Latinos from responding to census inquiries); see also Memorandum from Laurence Hamblen, Executive Director, Lane County Legal Aid Services, Inc., to Timothy Wood, Financial Fraud Division, Oregon Attorney General's Office 5 (Oct. 24, 1992) (on file with *The American University Law Review*) ("Hispanics often do not respond to census-takers. They may fear that the information will be reported to the Immigration and Naturalization Service (INS). And there is a culturally rooted mistrust of government shared

A substantial number of Latinos/as in America cannot speak English well or at all. Although Latinos/as learn English as fast or faster than other past immigrant groups,<sup>14</sup> the traditional pattern of English language acquisition extends to three generations: the first generation acquires some English ability but is mostly monolingual, the second generation is bilingual, and the third generation prefers English.<sup>15</sup> Several studies demonstrate that Latino/a English language acquisition is consistent with this model.<sup>16</sup> One study determined that of those Latino/a immigrants born and raised in Mexico, eighty-four percent speak mostly Spanish in their American homes. Eighty-four percent of their grandchildren born in America, however, speak mostly English at home, while only four percent speak mostly Spanish.<sup>17</sup>

Despite the normal English acquisition pattern, continued Latino/a immigration assures the presence in America's marketplace of millions of monolingual Spanish-speaking consumers (the Spanish-Only Consumer). As counted by the 1990 census, over seventeen million Americans speak Spanish at home.<sup>18</sup> If these Spanish-speaking Americans were gathered in a single state, it would be the

by Hispanics . . .").

14. Some observers have speculated that Latino/a immigrants fail to assimilate as quickly as other immigrant groups. See, e.g., Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 303 (1992) (quoting Senator Alan Simpson's remarks that "[t]he assimilation of the English language and other aspects of American culture by Spanish-speaking immigrants appears to be less rapid and complete than for other groups"). Several studies, however, have debunked this racist stereotype of the obstinate or ignorant Latino/a immigrant. See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863 (1993) (providing comprehensive response to Senator Simpson and other assimilationists who urge immigration reform to exclude immigrants of color).

15. See Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 312-17 (1989) (stating classic three-generation model of language acquisition and demonstrating its applicability to Latinos/as).

16. See, e.g., *id.* (discussing influential 1986 McCarthy/Valdez study of Mexican Americans in California confirming this model); 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, 71 (1992) (reporting results of 1988 Veltman study that points to shift toward two-generation pattern of English language acquisition for Latino/a immigrants).

17. Donald L. Horowitz, *Conflict and Accommodation: Mexican-Americans in the Cosmopolis, in MEXICAN-AMERICANS IN COMPARATIVE PERSPECTIVE* 78 (Walker Connor ed., 1985) (reporting results of 1978 Lopez study of 1129 couples in Los Angeles). My own family experience conforms to this normal shift in language ability and preference. My grandfather (Fernando Troncoso) immigrated to East Los Angeles from Chiapas around 1918 and my grandmother (Ramona Montes de Oca) left Guadalajara for California's Coachella Valley around 1921. Both learned English, but spoke mostly Spanish at home. My mother (Irene Troncoso), one of their five children, spoke both English and Spanish at home. Although I was born and raised in the East Los Angeles barrio, I spoke English at school and at home and know only some Spanish.

18. *1990 Census of Population and Housing*, Apr. 30, 1993, available in WESTLAW, Cendata file [hereinafter *1990 Census*] (reporting 17,339,172 Spanish-speakers).

third most populous, after California and New York.<sup>19</sup> Although slightly over half of these seventeen million Spanish-speakers reported that they can speak English very well,<sup>20</sup> 1,460,145 reported that they were completely unable to speak English, and 3,040,828 reported that they do speak English, but "not well."<sup>21</sup> These figures surely overstate the actual proficiency because those unable to speak English are often uncounted and those participating in the census are likely to exaggerate their language skills.<sup>22</sup>

Although not measured by the census, the number of Latinos/as in America unable to read English probably exceeds that of Latinos/as unable to speak it.<sup>23</sup> One estimate is that half of the Latino/a adults in America are functionally illiterate in English.<sup>24</sup> Moreover, many monolingual Spanish-speaking Latinos/as in America cannot read Spanish.<sup>25</sup> This circumstance is explained by illiteracy estimates in Mexico that range from seven<sup>26</sup> to twelve<sup>27</sup> to over twenty-five

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19. Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 VAND. L. REV. 1107, 1109 (1994).

20. 1990 Census, *supra* note 18.

21. 1990 Census, *supra* note 18.

22. See Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 NW. U. L. REV. 790, 801 n.66 (1991) (noting that census respondents exaggerate their linguistic ability to please census surveyors) (reviewing BILL PIATT, ONLY ENGLISH: LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990)); see also NATIONAL COUNCIL OF LA RAZA, THE EDUCATION OF HISPANICS: STATUS AND IMPLICATIONS 12 (1986) [hereinafter LA RAZA REPORT] (illustrating unreliability of subjective language assessments using 1978 study that 72% of children identified by others as able to speak English very well or well were limited-English proficient as tested). Inability to speak English is particularly acute in the low-income Latino/a community. In a recent United Way study of low-income Latino/a households in Lane County, Oregon, 85% of respondents (many of them recent immigrants) reported difficulty in speaking English. UNITED WAY OF LANE COUNTY, REACHING OUT—LANE COUNTY HUMAN NEEDS ASSESSMENT 22 (1994) (on file with *The American University Law Review*).

23. There is at least one example from the reported cases of Latino/a consumers able to understand English when spoken to them but unable to read it. See *United States v. Castillo*, 120 F. Supp. 522, 524-25 (D.N.M. 1954) (holding that person who cannot read is not negligent for failing to verify that instrument was note rather than contract).

24. LA RAZA REPORT, *supra* note 22, at 36.

25. See LA RAZA REPORT, *supra* note 22, at 36 (estimating that one-half of Latino/a adults cannot read and write English at functional level, and that almost 9 out of 10 of these persons are also illiterate in Spanish).

26. *More than Half*, MEXICO BUS. MONTHLY, Jan. 1, 1993, available on 1993 WL 2508438 (reporting results of Mexican government report that seven percent of Mexico's population cannot read or write).

27. *Education & Literacy Statistics*, SourceMex Econ. News and Analysis on Mexico, July 22, 1992, available on 1992 WL 2397791 (stating that adult illiteracy rate is currently 12.4% (6.1 million people) compared to 25.8% in 1970). The 1994 World Factbook reports an illiteracy rate in Mexico of 13% of those age 15 and over. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 260 (1994). E.g., *Salinas Sends Educational Reform Proposal to Congress*, LATIN AM. BUS. NEWS WIRE, Dec. 19, 1992 (stating that Mexican daily *La Jornada* estimated number of illiterates as high as 12%).



percent of the population.<sup>28</sup> These illiteracy statistics in turn reflect studies that estimate the average number of years of formal education in Mexico as anywhere from four<sup>29</sup> to less than seven.<sup>30</sup>

### B. *Language Fraud and English-Only in the Marketplace*

The Spanish-Only Consumer has become a victim of choice for unscrupulous merchants in America. Current frauds cover the full spectrum of the consumer marketplace: from telemarketing to home solicitation sales to the car lot. For example, in 1994, a spokesperson for the National Council of La Raza explained at a press conference that Latinos/as are targeted for telemarketing fraud because they may lack English language ability.<sup>31</sup> In California, a satellite dish vendor marketing door-to-door was accused of targeting Spanish-speaking homeowners to take advantage of the language barrier.<sup>32</sup> Other California operators targeted residents of East Los Angeles for home equity loan scams under which Latino/a homeowners unknowingly conveyed full title to their homes to the loan brokers.<sup>33</sup> In 1993, an Oregon car dealer was accused of using Spanish-speaking employees to entice immigrant customers to sign contracts written in English that sold them unwanted extras such as extended warranties and credit insurance.<sup>34</sup> Another Oregon car dealer misrepresented to a

28. *Report on 1990 Census Results*, SourceMex Econ. News and Analysis on Mexico, Mar. 18, 1992, available on 1992 WL 2396872 [hereinafter *Report on 1990 Census Results*] (reporting results of government census that reported 23 million Mexicans are illiterate out of total population of 81.3 million). The disparity in numbers among the different studies likely results from different methodologies employed to measure literacy and different definitions of literacy. For example, it is unclear whether children were included or excluded in the foregoing study. High illiteracy rates are also reported in countries such as Honduras (41%), El Salvador (28%), Bolivia (26%), the Dominican Republic (23%), and Brazil (22%). 21 *Latin American & Caribbean Nations: 1990 Population, Life Expectancy, 1980-1990 Average Annual Birth Rate*, Notisur-South American & Caribbean Political Affairs, Mar. 11, 1992, available on 1992 WL 2410845.

29. *New Revelations*, MEXICO BUS. MONTHLY, May 1, 1992, available on 1992 WL 2397851 (reporting that National Parents' Union disputes Mexican government's estimate of 6.5 years of formal education and instead estimates time spent as four years); see also LINDA KING, *ROOTS OF IDENTITY: LANGUAGE AND LITERACY IN MEXICO* 105 (1994) (reporting national education average in Mexico as only four years of primary schooling).

30. *New Revelations*, *supra* note 29 (reporting that Education Minister (now President), Ernesto Zedillo, found that average Mexican receives 6.5 years of formal education).

31. Tanika White, *Sweepstakes Fraud Targets Elderly*, BEACON J., Oct. 27, 1994, at A4.

32. Jennifer Warren, *Suit Links Satellite-Dish Seller, Lender to Fraud*, L.A. TIMES, Apr. 1, 1989, at 1.

33. Tracy Wilkinson, *Elderly, Poor Are Easy Prey for Home-Equity Schemers*, L.A. TIMES, Oct. 15, 1989, at 1 (describing immigrant victims unable to read English that signed documents in English that conveyed their homes); see also *How to Tell a Real Deal from a Well-Planned Scam*, SACRAMENTO BEE, Jan. 14, 1990, at B10 (describing plight of immigrant Latino/a homeowners who unknowingly put their homes up as collateral to finance satellite dish and other consumer purchases).

34. Maya Blackmun, *State Sues Auto Dealer, Alleging Illegal Sales Tactics*, OREGONIAN, Feb. 25, 1993, at A1 (noting that unwanted extras frequently cost over \$1000 and were included in

Spanish-speaking customer that an "as-is" warranty gave the customer a fifty-day period to rescind the purchase.<sup>35</sup> Other reported market frauds include an Arizona scam directed at Latinos/as who did not understand the process of car insurance and registration,<sup>36</sup> a New Jersey real estate scam that targeted recent immigrants with limited English skills,<sup>37</sup> and exploitation by certain notary publics of Spanish speakers' belief that they are lawyers.<sup>38</sup>

Besides exploiting the language barrier, unscrupulous merchants exploit Latino/a culture and the current anti-immigrant political climate. Take the example of a Mexican immigrant family targeted by a water purification company selling door-to-door.<sup>39</sup> Preying on what one observer described as the Mexican people's "national, almost religious quest" for pure water,<sup>40</sup> the company sold the family an overpriced, defective purification system for \$5000. A mortgage secured the purchase price that accrues interest at thirty-six percent per annum.<sup>41</sup> After paying \$6000 of monthly installments toward the purchase price, the family discovered that they still had to pay several thousand dollars or face losing their home. When they complained to the seller that they were unaware of the mortgage and the high interest rate, the seller responded that if they complained to any government agency or appeared in court to contest a foreclosure their immigration status would be investigated.<sup>42</sup> The climate created by California's Proposition 187<sup>43</sup> may cause any Latino/a, whether

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financing packages carrying 39% interest).

35. Letter from Matthew Berlin, Law Clerk, Lane County Legal Aid Service, Inc., to Timothy Wood, Financial Fraud Division, Oregon Attorney General's Office 2 (Feb. 9, 1993) (on file with *The American University Law Review*).

36. Frederick Bermudez, *Insurance Card Scam Probed, Hundreds of Drivers May Carry Fake Data*, ARIZ. REP., Dec. 2, 1992, at B1.

37. See *Rolo v. City Investing Co. Liquidating Trust*, 845 F. Supp. 182, 197 (D.N.J.), *aff'd*, 43 F.3d 1462 (3d Cir. 1994).

38. See Rosalind Resnick, *New Law Aims to Rein in State's Notarios Publicos*, MIAMI HERALD, July 8, 1991, at 15BM (discussing Florida disclosure law enacted to combat this abuse).

39. The example that follows roughly parallels a scam in East Los Angeles that targeted Latino/a immigrants. See *Wolf at the Door*, L.A. TIMES, Mar. 14, 1993, at 16.

40. DAVIS, *supra* note 11, at 183.

41. This modern example resonates with history. See TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 65-87 (1994) (describing displacement of Mexican rancho land holdings to Anglo immigrants in mid- to late 19th century California precipitated in part by exorbitant mortgage interest rates of 36% charged by Anglo creditors).

42. See Memorandum from Raul Ramirez, Hispanic Outreach Program Director, Oregon Attorney General's Office, to Timothy Wood, Financial Fraud Division, Oregon Attorney General's Office (May 24, 1995) (on file with *The American University Law Review*) (reporting practice in Oregon community of debt collectors threatening to turn undocumented Latinos/as in to federal immigration authorities unless they pay).

43. Passed by initiative in 1994, Proposition 187 requires educators, public health providers, and others to deny public services to those persons they suspect are not legal residents. Judges

documented or not, to avoid dealing with the government for fear of harassment or abuse. Abusive market practices thrive in this anti-immigrant climate.

While examples mount of affirmative frauds practiced on Spanish-Only Consumers, these consumers also fall victim to less publicized but more frequent abuse. Although most merchants will not affirmatively misrepresent their deals to the Spanish-Only Consumer, many merchants will transact business with them partially or entirely in English. These English language bargains can cause havoc because here, too, the consumer does not understand the true nature of the obligation incurred. In the analogous area of products liability, commentators have begun to debate how to protect the Spanish-Only Consumer and other language minorities who purchase products ignorant of their risks.<sup>44</sup> One purpose of this Article is to extend this debate to consumer transactions generally. Before proposing specific protections for language minority consumers, however, this Article reviews the shortcomings of existing consumer protection as applied to the non-English speaker.

*C. Existing Consumer Protection Against Language Fraud and English-Only in the Marketplace*

*1. The duty to read doctrine*

Applying existing law to the following bargain models illustrates the limited protection it provides to language minority consumers. Each model below involves a home improvement sale/loan transaction between a Spanish-Only Consumer and a home siding merchant.

*a. The fraud bargain*

In this model, the Spanish-Only Consumer signs a secured promissory note written in English that calls for interest at thirty-six

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in California have enjoined the enforcement of most of its provisions pending resolution of constitutional challenges against this mean-spirited measure that are expected to reach the Supreme Court. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 765-68 (C.D. Cal. 1995) (severing Proposition 187 and holding that federal law preempts initiative's classification and reporting provisions and its denial of primary and secondary education to undocumented immigrants); see also *infra* notes 176 and 208 and accompanying text (discussing potential impact of Proposition 187 on consumer protection).

44. See *infra* notes 218-19 (discussing strategies to protect Spanish-Only Consumer from dangerous products).

percent per annum. The merchant/lender represents orally in Spanish that the interest rate is only ten percent.<sup>45</sup>

*b. The unfair bargain*

The Spanish-Only Consumer signs a secured promissory note written in English that provides for interest at a rate that substantially exceeds a fair rate of return.<sup>46</sup> The merchant, however, does not make any oral statements about the interest rate.

*c. The unintended bargain*

Again, the merchant does not orally misrepresent the interest rate. Here, the secured promissory note written in English provides a rate of interest that, although facially high, is justified in relation to the risks of the transaction (e.g., absence of equity in the collateral, poor credit record). Upon her later discovery of the rate agreed to, however, the Spanish-Only Consumer objects that she would not have agreed to purchase the home improvements on such terms.<sup>47</sup>

\* \* \*

Relevant to each of these bargain models, the common law "duty to read" doctrine determines the obligations of a party who signs a written contract without reading its terms. That party is "conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to . . . [her subjective] understanding of its terms."<sup>48</sup> The duty to read extends to those persons unable to read the language of the contract:

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45. Cf. *United States v. Castillo*, 120 F. Supp. 522, 523 (D.N.M. 1954) (involving consumers who relied on false representation that they were signing repair contract that required satisfactory completion as condition to payment and were unaware they had signed unconditional note).

46. See Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 HOUS. L. REV. 721, 774-79 (1994) (discussing factors that determine fair rate of interest).

47. Cf. *Teran v. Citicorp Person-to-Person Fin. Ctr.*, 706 P.2d 382, 387-88 (Ariz. Ct. App. 1985) (refusing to hold lender accountable for failure of translator procured by borrowers to reveal that home improvement financing was secured by lien on their residence). In the *Teran* case, presumably, the existence of the lien was reasonable and not unusual for home improvement loan transactions with the terms offered by the lender.

48. *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366 (S.D.N.Y. 1975). The so-called duty to read is not a true duty owed to the other party to the contract. Rather, it refers to the consequence that a party must read the contract or be bound to what she fails to read. John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341, 341 n.4 (1974); see also Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1055-69 (1966) (explaining policies behind duty to read requirement).

It is well settled that where a person cannot read the language in which a contract is written, it is ordinarily as much his duty to procure someone to read it to him as it would be to read the agreement before signing, were he able to do so. Failure of a party to obtain a reading and explanation is ordinarily negligence which will estop the party from avoiding the contract on the ground that the party was ignorant of the contract's provisions.<sup>49</sup>

Thus, as applied to the Spanish-Only Consumer, the duty to read functions as a duty to obtain a translation. What appears to be an unbending rule against language minorities, however, is tempered somewhat by three exceptions, one fairly well established, one developing, and one that results from legislative intervention.

## 2. *The duty to read—the fraud exception*

Many courts recognize an exception to the duty to read when the other party has misrepresented the terms of the written contract.<sup>50</sup> In these circumstances, the victim may avoid the unread contract or, as recognized by the *Restatement (Second) of Contracts*, may claim a contract on the terms as represented.<sup>51</sup> Some courts, however, deny relief on the grounds that the defrauded party had no right to rely on an oral statement that the explicit language of the written contract contradicts.<sup>52</sup> Commentators criticize this result for allowing mere negligence to excuse deceit.<sup>53</sup> In any event, it is not clear if this

49. *Aluia v. Harrison Community Hosp.*, 362 N.W.2d 783, 787 (Mich. Ct. App. 1984); *see also* *Merrill, Lynch, Fenner & Smith, Inc. v. Benton*, 467 So. 2d 311, 313 (Fla. Dist. Ct. App. 1985); 2 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 4:16 (4th ed. 1990). In contrast, a few decisions place responsibility on the contract drafter to interpret the English language contract for the other illiterate or non-English speaking party. *E.g.*, *Trinh v. Metro. Life Ins. Co.*, 894 F. Supp. 1368, 1373-74 (N.D. Cal. 1995) (following dated California authority under which illiterate insurance applicant cannot be prejudiced by her failure to read insurance contract); *Miller v. Spokane Int'l Ry. Co.*, 143 P. 981, 984 (Wash. 1914) (refusing to adopt majority rule when injured Austrian laborer sought to avoid English language release paying him "trifling" amount for his damages). This decision is a precursor to the modern, developing unconscionability exception discussed *infra* Part I.C.3.

50. *E.g.*, *United States v. Castillo*, 120 F. Supp. 522 (D.N.M. 1954) (finding that homeowner signing unconditional promissory note relied on false representation of agent for home insulation company that they were signing conditional contract to repair their home); *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529, 533 (La. Ct. App. 1969) (finding that consumer was fraudulently induced into signing contract).

51. RESTATEMENT (SECOND) OF CONTRACTS § 21A (1981). *See generally* Dwight Preston, Comment, "No Hablo Ingles," 11 SAN DIEGO L. REV. 415, 428 (1974) (explaining remedies under California law when Spanish-speaking consumer is defrauded in marketplace).

52. *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988) (holding investors bound by arbitration clause in margin credit agreement despite claim they were told that margin agreement did not compromise any of their rights).

53. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 108, at 750 (5th ed. 1984); *see* Calamari, *supra* note 48, at 345 n.32 ("Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the

controversial outcome extends to parties unable to understand the language of the written contract.

As applied to the Spanish-Only Consumer, the fraud exception falls short of addressing the range of potential marketplace abuses. In the case of the Fraud Bargain where a written term is orally misrepresented, courts that recognize the fraud exception will either rescind the contract or enforce the term as it was represented.<sup>54</sup> Some courts might conclude, however, that the Spanish-Only Consumer's negligence in failing to obtain a translation of the written contract precludes any remedy for the merchant's deceit.<sup>55</sup>

The Unfair Bargain model assumes that the merchant has not misrepresented the unfair term in the written contract. As such, even when otherwise recognized, the fraud exception is not available unless the court imposes an affirmative duty on the merchant to disclose the unfair term. Merchants have no general duty to disclose Unfair Bargains, although exceptions have emerged that may ultimately overcome the merchant's right to remain silent.<sup>56</sup> Thus far, courts have not established an exception specifically to protect a consumer who agrees to an unfair bargain because she was unable to understand the language of the written contract. The doctrine of unconscionability, however, may provide an analogous duty to disclose unfair terms to those consumers the merchant knows (or perhaps has reason to know) are unable to protect themselves. Its usual remedies are inadequate to deter unscrupulous merchants,<sup>57</sup> and thus, unconscionability is no substitute for the development in the law of deceit of a comprehensive duty to disclose that protects Spanish-Only victims of Unfair Bargains.<sup>58</sup>

Finally, the fraud exception may not protect the victim of the Unintended Bargain who has agreed to a bargain that, although objectively fair, is one that the consumer would not have agreed to had she understood the contract. Here, there has been no affirmative misrepresentation. Moreover, imposing a duty to disclose (translate) actionable as deceit is inappropriate, at least when a merchant has no

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administration of pure justice." (quoting *Western Mfg. Co. v. Cotton & Long*, 104 S.W. 758, 760 (Ky. 1907))).

54. RESTATEMENT (SECOND) OF CONTRACTS § 21A (1981).

55. See *supra* note 52 and accompanying text.

56. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 9-20, at 367 (3d ed. 1987).

57. See *infra* Part I.C.3 (explaining reach and shortcomings of unconscionability doctrine as applied to language fraud and English-Only in marketplace).

58. See *infra* Part III.D.3 (discussing potential grounds on which court could impose duty on merchants to disclose unfair terms to language minority consumers).

reason to know that the objectively desirable deal is undesirable to the Spanish-Only Consumer.

### 3. *The duty to read—the developing unconscionability exception*

For centuries, equity courts have denied specific performance of land conveyances and certain other contracts when the bargain sought to be enforced is unconscionable.<sup>59</sup> Since section 2-302 of the Uniform Commercial Code (UCC) codified the unconscionability doctrine for credit sales of goods,<sup>60</sup> that doctrine has become part of the general common law of contracts.<sup>61</sup> Although courts have not yet articulated a predictable formula for defining unconscionability, the developing standard holds promise for the Spanish-Only Consumer. Many courts have adopted the distinction the late Professor Arthur Leff coined between procedural unfairness or “bargaining naughtiness” in contract formation and substantive unfairness in a contract’s terms.<sup>62</sup> In holding a contract or contractual term unconscionable, these courts usually require some showing of both procedural and substantive unfairness.<sup>63</sup> For example, in its classic common law articulation, unconscionability has involved “an absence of meaningful choice on the part of one of the parties [procedural unfairness] together with contract terms which are unreasonably favorable to the other party [substantive unfairness].”<sup>64</sup>

So articulated, the unconscionability doctrine should encompass the Spanish-Only victim of an Unfair Bargain and create another exception to the duty to read doctrine.<sup>65</sup> In this bargain model, the consumer can point to both the bargain’s substantive unfairness and to the “bargaining naughtiness” that occurred when the merchant

59. See generally Bender, *supra* note 46, at 735 (explaining judicial use and adoption of unconscionability standard to monitor bargain fairness).

60. U.C.C. § 2-302, at 68-69 (1962).

61. Bender, *supra* note 46, at 735-36.

62. See Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 550 (1967) (criticizing unconscionability standard as one causing courts to decide cases through guesswork); see also Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1053 (1977) (labeling unconscionability classifications as “non-substantive” and “substantive”).

63. See Bender, *supra* note 46, at 747 (describing judicial application of U.C.C. § 2-302 to support finding of unconscionability).

64. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 94-97 (N.J. 1960) (holding that automobile dealer’s disclaimer of implied warranty of merchantability and its exclusion of other responsibilities violated public policy in light of parties’ grossly unequal bargaining positions).

65. See Calamari, *supra* note 48, at 355 (observing unconscionability doctrine creates an exception to, but does not expunge, duty to read). The unconscionability doctrine should encompass Spanish-Only victims of an Unfair Bargain because one with little bargaining power who signs a contract without full knowledge of its terms can hardly be said to have consented to its provisions. See *id.* (describing application of unconscionability doctrine).

took advantage of the consumer's inability to understand the English language contract, at least when the merchant knew or had reason to know of that inability. The few cases that have applied the unconscionability doctrine to the Spanish-Only Consumer support this analysis. For example, after negotiations in Spanish, a Latino consumer in *Frostifresh Corp. v. Reynoso*<sup>66</sup> signed a contract written in English to purchase an overpriced refrigerator.<sup>67</sup> Although commentators sometimes cite this New York case as authorizing courts to declare a contract unconscionable on substantive unfairness alone,<sup>68</sup> it appears that the case's outcome was influenced by the Spanish-Only Consumer's inability to understand the price of the written bargain.<sup>69</sup> In *Albert Merrill School v. Godoy*,<sup>70</sup> another New York court agreed that a consumer's inability to understand English is relevant in determining whether the consumer exercised a meaningful choice.<sup>71</sup> Earlier, the same New York court applied the unconscionability provision in section 2-302 of the UCC to strike down a contract written in English in which a Spanish-Only Consumer agreed to waive warranties in the purchase of an automobile.<sup>72</sup>

Although most of the reported decisions applying unconscionability to protect Spanish-Only Consumers were issued by lower courts during the 1960s and 1970s, a 1988 decision by the Eighth Circuit Court of Appeals supports application of the doctrine to the victim of an Unfair Bargain. In *Besta v. Beneficial Loan Co.*,<sup>73</sup> the court concluded that it was unconscionable for a lender to extend credit under a six-year loan plan without informing the borrower that the monthly payments and total payment amount under an alternative three-year plan were lower.<sup>74</sup> Rather than deciding the case on the substantive unfairness of the six-year plan alone, the court looked to

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66. 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 281 N.Y.S.2d 964 (Sup. Ct. App. Term 1967).

67. *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 758 (Dist. Ct. 1966), *rev'd on other grounds*, 281 N.Y.S.2d 964, 964 (Sup. Ct. App. Term 1967).

68. See Bender, *supra* note 46, at 749 (citing *Frostifresh* and other "classic" consumer price unconscionability cases); Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 753 n.41 (1982) (citing *Frostifresh* and other cases that may suggest but do not rely on circumstances of high-pressure selling).

69. The *Restatement (Second) of Contracts* employs the *Frostifresh* facts to illustrate that a party's inability to understand the language of a contract is a relevant factor in determining whether the bargaining process is unconscionable. See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d, illus. 3 (1979) (explaining that relevant factors in determining existence of unconscionability in bargaining process include one's inability to understand language of agreement).

70. 357 N.Y.S.2d 378 (Civ. Ct. 1974).

71. *Albert Merrill Sch. v. Godoy*, 357 N.Y.S.2d 378, 381-82 (Civ. Ct. 1974).

72. *Jefferson Credit Corp. v. Marcano*, 302 N.Y.S.2d 390, 392-94 (Civ. Ct. 1969).

73. 855 F.2d 532 (8th Cir. 1988).

74. *Besta v. Beneficial Loan Co.*, 855 F.2d 532, 535 (8th Cir. 1988).



the unfair surprise that resulted from the lender's failure to disclose the more advantageous plan to a consumer the lender knew was unaware of the better deal.<sup>75</sup> Although commentators have predicted that the *Besta* line of cases, holding lenders liable to borrowers, will be a "short-lived aberration in lender liability law,"<sup>76</sup> *Besta*, in fact, falls squarely within the mainstream of unconscionability cases that insist on a showing of both procedural and substantive unfairness. The Spanish-Only victim of an Unfair Bargain might rely on *Besta* to argue that a lender must disclose (translate) any disadvantageous terms that the lender knows the consumer does not understand because of the language barrier.<sup>77</sup>

Although the unconscionability doctrine should extend to victims of an Unfair Bargain, its shortcomings limit its effectiveness as a consumer protection tool for Latinos/as and other language minorities. For example, remedies for unconscionable conduct often inadequately deter such conduct. Courts have not only declined to award tort remedies, such as punitive damages, to victims of unconscionable contracts, but have also refused to award restitution and other affirmative damages.<sup>78</sup> For example, when a merchant's price is unconscionably excessive, at most, courts limit the merchant's bargain to the fair price it should have charged and will not require the merchant to return any overpayment.<sup>79</sup> This sanction inadequately deters merchants from imposing substantively unfair terms on Spanish-Only Consumers.

Another concern is that the unconscionability doctrine might require substantive unfairness and, therefore, may not reach the victim of an Unintended Bargain. As the Official Comments to section 2-302 of the UCC articulate, the basic test for unconscionability is whether "the clauses involved are so one-sided as to be uncon-

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75. *Id.*

76. Warren L. Dennis & Mark Mosling, *Death Knell for Fiduciary Duties of Lenders to Consumer Borrowers*, 46 BUS. LAW. 1323, 1323 (1991).

77. I have argued elsewhere that courts, in the consumer setting, should strike down bargains on substantive unfairness alone. See Bender, *supra* note 46, at 747-51 (describing scholarly and judicial indecision whether to require proof of both substantive and procedural unfairness to support finding of unconscionability). One advantage that accrues when courts treat the failure to disclose as procedural unfairness is that courts might find a bargain unconscionable on a lesser degree of substantive unfairness. Moreover, this approach avoids the controversy over striking down bargains on substantive unfairness alone. *Id.* at 748.

78. See Bender, *supra* note 46, at 757-60 (explaining variety of judicial remedies for unconscionable contracts).

79. See *Frostifresh Corp. v. Reynoso*, 281 N.Y.S.2d 964, 965 (Sup. Ct. App. Term 1967) (explaining that lower court erred in failing to award reasonable profit plus net costs to seller of unconscionably priced product); cf. *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 850 (Ct. App. 1991) (affirming trial court's reduction of unconscionable 200% interest rate to reasonable 24% rate).

scionable.”<sup>80</sup> Some commentators read decisions under section 2-302 to mean that when grossly unfair, contract terms can be unconscionable without proof of any procedural unfairness.<sup>81</sup> Unconscionability under the common law and section 2-302, however, does not yet grant relief for procedural unfairness standing alone that lacks a separate and established basis for relief,<sup>82</sup> as when there is duress or fraud.

#### 4. *The duty to read—the legislative exception*

Federal or state law that requires the delivery of a translated consumer contract serves as a legislative exception to the duty to read doctrine. The potential of this legislative exception remains unrealized. Neither federal nor state law imposes a comprehensive duty on merchants to translate consumer contracts for the benefit of language minorities. Instead, most existing statutory and administrative requirements only target consumer transactions with the most notorious records of abuse. For example, federal law singles out only door-to-door and used car sales. As required by a Federal Trade Commission (FTC) rule, door-to-door sellers must provide buyers with a contract written in the same language as that used principally in the oral sales presentation.<sup>83</sup> Under another FTC rule, sellers of used motor vehicles who “conduct a sale in Spanish” must deliver prescribed warranty information, according to a specific format, in Spanish.<sup>84</sup> State law has singled out such problematic transactions

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80. U.C.C. § 2-302 cmt. 1, at 69 (1962).

81. See Bender, *supra* note 46, at 749 (citing “classic” consumer price unconscionability cases that support this conclusion).

82. See *infra* Part III.E (discussing theories by which unconscionability doctrine might extend to Unintended Bargains). Although the Eighth Circuit’s decision in *Besta* might be read to have relied solely on the procedural unfairness of the lender’s failure to disclose a more advantageous bargain, the existence of that better bargain made the bargain actually struck substantively unfair. Moreover, the lender’s failure to disclose in these circumstances is a close cousin to fraud. See *Besta v. Beneficial Loan Co.*, 855 F.2d 532, 535-36 (8th Cir. 1988). A lower New York court invalidated a sales contract as unconscionable because the Spanish-Only Consumer was unable to understand the English contract and because the seller invoked high pressure sales tactics without providing a Spanish-speaking interpreter, but the reporting of the facts and the court’s reasoning is sketchy. *Brooklyn Union Gas Co. v. Jimenez*, 371 N.Y.S.2d 289, 290 (Civ. Ct. 1975).

83. See 16 C.F.R. § 429.1(a) (1995) (providing for delivery of three-day cancellation notice in same language as contract).

84. See 16 C.F.R. § 455.5 (1995) (establishing disclosure requirements and format for sales conducted in Spanish language). The FTC, however, has approved exemptions from its used car rule in favor of state law in Maine and Wisconsin that fails to require Spanish language translation. In both cases, the FTC relied on evidence that the Latino/a populations in those states were small. See 53 Fed. Reg. 16,390, 16,393 (1988) (exempting Maine); 51 Fed. Reg. 20,936, 20,941-42 (1986) (exempting Wisconsin).

as "rent-to-own" or lease-purchase agreements<sup>85</sup> and social referral (dating) service contracts by imposing translation requirements.<sup>86</sup>

This selective approach provides only limited protection. Federal consumer disclosure statutes of general application usually fail to require translations for language minorities. For example, the Truth in Lending Act,<sup>87</sup> the Truth in Savings Act,<sup>88</sup> the Real Estate Settlement Procedures Act,<sup>89</sup> the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,<sup>90</sup> and the Interstate Land Sales Full Disclosure Act,<sup>91</sup> require disclosure of certain information to aid consumers in making an informed choice, but none of the statutes compels translation of the required disclosures for language minorities.<sup>92</sup> For example, under the Truth in Lending Act, a lender has no obligation to supply interest rate disclosures to a Spanish-Only

85. See OR. REV. STAT. § 646.249 (1993) (stating that statutory disclosures in lease-purchase agreements must be provided in non-English language in which any portion of the transaction is conducted). This section does not apply if the consumer supplies an interpreter to conduct any part of the transaction. *Id.*

86. See N.Y. GEN. BUS. LAW § 394-c7(b) (McKinney Supp. 1995) (stating that seller of social referral services must furnish buyer with contract in same language as that used principally in oral sales presentation).

87. 15 U.S.C. §§ 1601-1677 (1994) (advancing disclosure of consumer credit terms to promote informed credit use, to protect consumers, and to encourage competition among financial institutions to enhance economic stability).

88. 12 U.S.C. §§ 4301-4313 (1994) (specifying federal standards for clear and uniform disclosure of financial institutions' interest rates and fees).

89. *Id.* §§ 2601-2617 (stating federal requirements for variety of steps involved in real estate settlement process in order to better protect consumers).

90. 15 U.S.C. §§ 2301-2312 (1994) (specifying content of consumer product warranties).

91. *Id.* §§ 1701-1720 (setting forth federal registration and disclosure requirements pertaining to land sales).

92. *Cf.* County Trust Co. v. Mora, 383 N.Y.S.2d 468, 470 (Rockland County Ct. 1975) (explaining that Truth in Lending Act does not require disclosures in Spanish even when consumers cannot understand English). On the other hand, a defective English disclosure statement that a Spanish-Only Consumer could not understand was no defense to liability. See Zamariippa v. Cy's Car Sales, Inc., 674 F.2d 877, 879 (11th Cir. 1982) (rejecting subjective standard measuring consumer's deception or misunderstanding to determine whether relief should be granted when seller's disclosure statements failed to comply with federal regulations).

At best, sometimes these federal disclosure laws expressly allow translations at the option of the business. See, e.g., 12 C.F.R. § 230.3(b) (1995) (permitting depository institutions to give Truth in Savings disclosures in other languages if English disclosures are available upon request); 24 C.F.R. § 3500.6(d)(3) (1995) (explaining that lender may translate special information booklet required by Real Estate Settlement Procedures Act into languages other than English); *id.* § 3500.9(a)(8) (stating that settlement statement of Department of Housing and Urban Development may also be translated into languages other than English). Because creditors in Puerto Rico are expressly given the option to provide Truth in Lending disclosures in Spanish, this might imply that rate disclosure translations are improper in other locations. See 12 C.F.R. § 226.27 (1995) (authorizing disclosure in English and/or Spanish in Puerto Rican transactions). The Board of Governors of the Federal Reserve System has concluded, however, that Arizona's state disclosure law under the Small Loans Act, requiring disclosures of Truth in Lending information in English and Spanish, is consistent with, and not preempted by, federal law if every borrower receives English disclosures and the Spanish disclosures are provided as additional information. See 50 Fed. Reg. 25,068-69 (1985) (examining state language disclosure requirements vis-à-vis federal regulations).

Consumer in Spanish.<sup>93</sup> Moreover, even when federal law requires translated disclosures, it fails to provide a private right of action to enforce these requirements.<sup>94</sup>

State law overcomes some of the inadequacies of federal law. First, at least one state requires certain lenders to translate their Truth in Lending disclosures into Spanish.<sup>95</sup> Also, many states have enacted counterparts to the federal door-to-door rule that allow for private enforcement to ensure that merchants write home solicitation sales contracts in the same language they used in the oral sales presentation.<sup>96</sup> Alternatively, state "baby" or "little" FTC acts may authorize a private action for violations of FTC regulations, such as those for door-to-door and used car sales.<sup>97</sup> Finally, a few state statutes impose a translation requirement that covers more than isolated consumer transactions. For example, California law requires written translations of certain loan contracts, residential leases, and other consumer contracts that are negotiated primarily in Spanish.<sup>98</sup> Under an Illinois statute, it is an unlawful practice to fail to provide a translated written contract, if the retail transaction is negotiated in a language other than English.<sup>99</sup> Finally, a Florida regulation declares it an

93. If the financing transaction results from a door-to-door sale but involves the creation of a non-purchase money loan secured by a principal dwelling, the Federal Trade Commission's door-to-door rule that would require certain Spanish-language disclosures gives way to the Truth in Lending Act. See 16 C.F.R. § 429.1 note 1(a)(2) (1994) (stating requirements for door-to-door sales shall not apply where consumer has rescission under Consumer Credit Protection Act); see also BILL PIATT, *ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES* 147-48 (1990) (pointing out inconsistency of federal laws that require Spanish language disclosures of warranty information in used car sales, but do not require Spanish language disclosure of interest rate and total payments due when automobile purchase is financed).

94. Rather, noncompliance with the door-to-door or the used car rule constitutes a violation of the Federal Trade Commission Act (FTCA) that is actionable only by the FTC. See Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 OR. L. REV. 639, 640 n.7 (1994) (detailing federal court's rejection of consumer litigants' attempts to pursue private actions under FTCA).

95. See ARIZ. REV. STAT. ANN. § 6-651(A)(2) (Supp. 1995) (requiring consumer loan providers to provide Spanish-language disclosures on request); cf. CAL. CIV. CODE § 1632(b)-1632(b)(1) (West Supp. 1995) (noting that financial organization complies with California's Spanish-language contract translation requirement by providing Spanish translation of disclosures required under Truth in Lending Act).

96. See, e.g., CAL. CIV. CODE § 1689.7 (West Supp. 1995) (providing that buyer's agreement, resulting from home solicitation contract, may be canceled by buyer within specified time); N.Y. PERS. PROP. LAW § 428 (McKinney 1992) (providing for buyer's right to cancel door-to-door sales).

97. See JONATHAN SHELDON & CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* § 3.2.4.6, at 90 (3d ed. 1991) (explaining that state statutes may create private right of action by making per se violation for failure to follow federal provisions, even though private right of action may not be available at federal level).

98. CAL. CIV. CODE § 1632 (West Supp. 1995) (requiring any person in trade or business to furnish Spanish translation contract when oral negotiations are conducted in same language).

99. ILL. ANN. STAT. ch. 815, para. 505/2N (Smith-Hurd 1993).

unfair or deceptive trade practice to fail to provide a translation of a contract negotiated principally in a language other than English.<sup>100</sup>

Despite these provisions, state law does not fully overcome the inadequacies of federal law. Several states, other than California, Florida, and Illinois, with large and growing language minority populations do not have comprehensive consumer translation requirements. As the next section discusses, the English language movement threatens both to hinder the enactment of translation laws in these states and to undermine the few existing translation laws. Moreover, design flaws in existing state translation laws limit their effectiveness. These flaws are also discussed below.<sup>101</sup>

## II. OBSTACLES AND CONSIDERATIONS IN ENSURING CONSUMER PROTECTION FOR LANGUAGE MINORITIES

### A. *Impact of English Language Movement on Consumer Protection Regulation*

Roots of the Official English and English-Only movements<sup>102</sup> are apparent in xenophobic hostility during the early 1900s toward immigrants from southern and eastern Europe.<sup>103</sup> For example, Nebraska's 1920 constitutional amendment declaring English the official state language<sup>104</sup> grew out of anti-German sentiment.<sup>105</sup> By 1923, thirty-four states had laws that declared English the language of

100. FLA. ADMIN. CODE ANN. r. 2-9.005 (1995).

101. See *infra* Part II.D (examining whether legislative protection of language minorities should be language neutral); *infra* Part III.A.2 (discussing legislative reform for protection of language minorities).

102. "Official English" refers to those laws that provide that English is the "official language" of the state. In contrast, "English-Only" refers to those laws that further purport to prohibit the government from acting in languages other than English. Some state laws are not easily categorized as one or the other. See Lowrey, *supra* note 13, at 283 n.311 (explaining differences between Official English and English-Only legislation).

103. See generally DENNIS BARON, THE ENGLISH-ONLY QUESTION 1-13 (1990) (describing early beginnings of state Official-Language laws); Lowrey, *supra* note 13, at 282-83 (describing perception of and negative sentiment against waves of immigrants and resulting changes in state legislation).

104. NEB. CONST. art. 1, § 27; see also Jamie B. Draper & Martha Jiménez, *A Chronology of the Official English Movement*, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 89 (James Crawford ed., 1992) [hereinafter LANGUAGE LOYALTIES]. An Illinois statute, adopted in 1923, declared "American" as its official language, but was amended in 1969 to substitute English for American. ILL. ANN. STAT. ch. v., para. 460/20 (Smith-Hurd 1991); see Dennis Baron, *Federal English in LANGUAGE LOYALTIES*, *supra*, at 36, 39 (describing passage of Illinois state bill promoting American over English as official state language due to American hostility toward British).

105. Lowrey, *supra* note 13, at 282 & n.307.

school instruction.<sup>106</sup> Since then, most states have enacted laws that require the use of English in specific situations, such as in testing for occupational licenses.<sup>107</sup>

During the 1980s, resurgent xenophobia, directed this time toward Latino/a and Asian immigrants, revived interest in and support for comprehensive English language laws.<sup>108</sup> Organizations, such as U.S. English, formed to urge states and Congress to enact Official English and English-Only laws<sup>109</sup> that encompass all aspects of government. Arizona, Arkansas, California, Colorado, Florida, Georgia, Indiana, Kentucky, Mississippi, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia adopted English language laws by legislation or initiative during the 1980s.<sup>110</sup> In 1990, Alabama joined these states.<sup>111</sup>

By the end of the 1980s, the language movement had begun to lose momentum. In 1989, legislatures in New Mexico, Oregon, and

106. Joseph Leibowicz, *Official English: Another Americanization Campaign?*, in LANGUAGE LOYALTIES, *supra* note 104, at 101, 105.

107. Many states require that examinations for business or professional licenses be conducted in English. *See, e.g.*, ALA. CODE § 34-29-73 (1975) (veterinary license); CAL. BUS. & PROF. § 1630 (West 1996) (dentistry license); MO. ANN. STAT. § 340.240 (Vernon 1995) (veterinary license); MONT. CODE ANN. § 37-3-311 (1993) (license to practice medicine).

108. A 1978 amendment to Hawaii's Constitution declared English and Hawaiian as official state languages—a move intended to be inclusive of the state's primary language minority. HAW. CONST. art. XV, § 4.

109. For more detailed history of U.S. English and the modern English language movement, see generally JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF "ENGLISH ONLY" (1992) (arguing that promotion of English-Only mentality or unilingualism is short-sighted and choice to speak other native languages is question of individual rights and self-determination); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) (reporting that historical oversight of current Official English language movement is its failure to recognize that other languages, besides English, were also accepted by several states as "official" languages). For example, California's first constitution provided for laws to be published in English and Spanish. Perea, *supra*, at 317; *see also* Andre Sole, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 FLA. L. REV. 803, 820-32 (1993) (describing 1983 formation of U.S. English, an activist group that advocates state and federal English-Only statutes, constitutional English-Only amendment, eradication of bilingual voting ballots and education, claiming to promote national unity and to encourage immigrants to learn English).

110. ARIZ. CONST. art. 28; ARK. CODE ANN. § 1-4-117 (Michie Supp. 1993); CAL. CONST. art. 3, § 6; COLO. CONST. art. 2, § 30; FLA. CONST. art. 2, § 9; 1986 Ga. Laws 529; IND. CODE ANN. § 1-2-10-1 (Burns 1993); KY. REV. STAT. ANN. § 2.013 (Baldwin 1995); MISS. CODE ANN. § 3-3-31 (1991); N.C. GEN. STAT. § 145-12 (1994); N.D. CENT. CODE § 54-02-13 (1989); S.C. CODE ANN. § 1-1-696 (Law. Co-op. Supp. 1994); TENN. CODE ANN. § 4-1-404 (1991); VA. CODE ANN. § 22.1-212.1 (Michie 1993). Georgia's adoption was by a nonbinding resolution. 1986 Ga. Laws 70. In 1995, however, Georgia's governor vetoed Official English legislation. *See* 1995 Ga. S.B. 49, 143rd Gen. Assembly, Reg. Sess. (1995) available in WESTLAW, Bill Tracking Database. *See generally* English Only Translates to Hostility, ATLANTA CONST., Apr. 26, 1995, at A14 (editorial) (stating Georgia governor's two reasons for vetoing Official English bill: (1) bill invites lawsuits from non-English speakers that would be expensive for state to defend; and (2) bill sends signal of hostility and disapproval to immigrants).

111. ALA. CONST. amend. 509.

Washington adopted resolutions that embraced multilingualism.<sup>112</sup> Rhode Island's legislature did so in 1992.<sup>113</sup> The success of California's Proposition 187, however, has revived the English language campaign. Although none of the many Official English or English-Only bills introduced in Congress since 1981<sup>114</sup> progressed beyond a committee hearing, the Language of Government Act of 1995 stands a real chance of passage.<sup>115</sup> In 1995, Connecticut, Georgia, Iowa, Maryland, Massachusetts, Montana, New Hampshire, New York, Ohio, Pennsylvania, South Dakota, Washington, West Virginia, and Wisconsin considered Official English or English-Only bills.<sup>116</sup> Montana, New Hampshire, and South Dakota enacted language legislation in 1995, and Wyoming joined them in 1996, becoming the first states to do so since 1990.<sup>117</sup> In the first two months of 1996, English language laws were introduced in Kansas, Missouri, New Jersey, Oklahoma, and Rhode Island, as well as in many

112. H.R.J. Mem. Res. 16, 39th Leg., 1st Sess., 1989 N.M.; S.J. Res. 16, 65th Leg., 1989 Or. Sess.; H.R. Res. 2129, 51st Leg., 1989 Wash. Legis. Serv. 236 (West).

113. R.I. GEN. LAWS § 42-5.1-1 (1993) (articulating state's policy that multilingualism and diverse backgrounds of its citizens contribute to state's economy and that it is every resident's right to nurture their native language, although English remains primary language of United States). Despite frequent reference to Louisiana as an "Official English" state, Louisiana law does not so provide and its legislature rejected such legislation in 1994 and in prior year efforts. See Gail D. Cox, "English-Only": A Legal Polyglot, NAT. L.J., Oct. 26, 1987, at 1, 10 (noting that English language effort that failed because of concern it would imperil efforts to promote Cajun); cf. R. Geoffrey Dillard, Note, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 GA. L. REV. 197, 244 n.88 (1994) (listing Louisiana as an "Official-English" state since 1812, presumably referencing a since repealed provision of Louisiana's Constitution); U.S. ENGLISH, TOWARDS A UNITED AMERICA (containing promotional materials from U.S. English that reflect Louisiana as "Official English" state) (on file with *The American University Law Review*).

114. Former Senator Samuel I. Hayakawa of California introduced the first proposal as a constitutional amendment. S.J. Res. 72, 97th Cong., 1st Sess. (1981). That law sought to preclude Congress and every state government from making or enforcing any law that required the use of a language other than English. See generally Elliot L. Judd, *The English Language Amendment: A Case Study on Language and Politics*, 51 REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO 115 (1990) (discussing history of various federal English language proposals from 1981 to 1986).

115. H.R. 123, 104th Cong., 1st Sess. (1995); S. 356, 104th Cong., 1st Sess. (1995). Unlike some prior efforts, however, these bills are not proposed as precursors to a constitutional amendment.

116. See 1995 Conn. H.B. 5262; 1995 Ga. H.B. 378; 1995 Iowa H.B. 47; 1995 Md. H.B. 657; 1995 Md. S.B. 200; 1995 Mass. H.B. 477; 1995 Mont. H.B. 376; 1995 N.H. Laws 157; 1995 N.Y. A.B. 2432; 1995 N.Y. A.B. 6153; 1995 N.Y. S.B. 938; 1995 Ohio H.B. 273; 1995 Pa. H.B. 793; 1995 Pa. S.B. 1216; S.D. Codified Laws Ann. § 1-27-20 (1995); 1995 Wash. S.J.R. 8209; 1995 W. Va. H.B. 2378; 1995 Wis. A.J. Res. 291.

117. MONT. CODE ANN. LAWS § 3-1-314 (1995); 1995 N.H. LAWS 157 (to be codified at N.H. REV. STAT. ANN. § 3-C:1); S.D. CODIFIED LAWS ANN. § 1-27-20 (1995); 1996 Wyo. Sess. Laws 154 (to be codified at WYO. STAT. § 8-6-101). The governors of Georgia and Maryland vetoed English-language legislation. See 1993 Md. H.B. 982, 408th Legis. Sess., Reg. Sess. (1994) available in WESTLAW, Bill Tracking Database (noting that governor vetoed this legislation in May 1994); *supra* note 110 (discussing Georgia governor's veto). Delaware's governor did so in 1994. See Del. H.B. 460, 137th Gen. Assembly, Reg. Sess. (1993-94).

of the states that considered but failed to adopt these laws in 1995.<sup>118</sup>

The legality of these language laws and their impact on consumer protection remain unresolved. Resolution of these issues may depend on the precise wording of the particular language law. At one extreme, Arizona's "English-Only" constitutional provision states that all political subdivisions in Arizona must "act in English and in no other language" except in certain narrow circumstances such as to protect health and safety.<sup>119</sup> Shortly after the provision's adoption by initiative in 1988, Arizona's Attorney General construed this provision narrowly to conclude that it does not "interfere with the fair and effective delivery of governmental services in languages other than English, or otherwise affect governmental operations so as to unreasonably disadvantage non-English speakers."<sup>120</sup> A subsequent Attorney General opinion concluded that Arizona's new constitutional provision did not prohibit the production of Spanish public service announcements by the Commission on the Arizona Environment.<sup>121</sup> In 1995, however, the Ninth Circuit rejected this construction as incompatible with the provision's plain language, which prohibited state employees from using languages other than English.<sup>122</sup> The Ninth Circuit held that the law, as written, is overbroad and violates the First Amendment of the United States Constitution.<sup>123</sup>

Of lesser effect are laws that simply declare English the "official" state language.<sup>124</sup> As one commentator observed, these "Official

118. 1995 Kan. H.B. 2929, 76th Legis., Reg. Sess. (1996); 1996 Mo. H.B. 985, 88th Gen. Assembly, 2d Sess. (1996); 1996 N.J. S.B. 276, 207th Legis., 1st Sess. (1996); 1995 Okla. H.B. 2054, 45th Legis., 2d Reg. Sess. (1996); 1995 R.I. S.B. 2241, Legis. Sess. (1996).

119. ARIZ. CONST. art. 28, § 3(1)(a). For a list of exceptions, including the exception for health and safety, see ARIZ. CONST. art. 28, §§ 3(2)(a)-3(2)(e).

120. Ariz. Op. Att'y Gen. I89-009 (1989).

121. Ariz. Op. Att'y Gen. I89-013 (1989); see also Califa, *supra* note 15, at 300-01 (describing interpretation of Florida county's English-Only ordinance). Before its repeal in 1993, the Antibilingual Ordinance of Dade County, Florida, had been construed by the county attorney's office as even forbidding Spanish-language recordings on the government's "Tel-Consumer hotline" aimed at Spanish-speaking consumers. See CRAWFORD, *supra* note 109, at 108.

122. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 930 (9th Cir. 1995) (en banc) (describing Attorney General's interpretation as attempt "to resurrect a facially unconstitutional measure"), cert. granted, 64 U.S.L.W. 3635, 3639 (U.S. Mar. 25, 1996) (No. 95-974).

123. *Id.* at 940-42. As a result of the *Yniguez* decision, Tennessee's English-Only law is also of dubious constitutional validity because its plain language encompasses the speech of government employees. See TENN. CODE ANN. § 4-1-404 (1991) (stating that "[a]ll communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English").

124. See, e.g., COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; HAW. CONST. art. XV, § 4; NEB. CONST. art. I, § 27; ARK. CODE ANN. § 1-4-117 (Michie Supp. 1993); 5 ILCS 460/20 (1993); IND. CODE § 1-2-10-1 (1993); KY. REV. STAT. ANN. § 2.013 (Baldwin 1995); MISS. CODE ANN. § 3-3-31 (1991); N.C. GEN. STAT. § 145-12 (1990); N.D. CENT. CODE § 54-02-13 (1989); VA. CODE ANN. § 22.1-212.1 (Michie 1993).



English” laws “appear on their face to have little more [legal] significance than a state’s choice of an official motto or the official state bird.”<sup>125</sup> Courts will likely adopt this narrow interpretation.<sup>126</sup> For example, in concluding that no Illinois law prohibited city election officials from giving voter assistance information in Spanish, the Seventh Circuit observed that the Illinois Official English statute appears with those naming the state bird and the state song and has “never been used to prevent publication of official materials in other languages.”<sup>127</sup> So construed, laws that merely declare English as the state’s “official” language should create no legal rights in favor of the English-speaking majority.

Substantial legal questions surround the validity of a third form of comprehensive language law that does more than declare English the official language of government but does not expressly restrict the speech of government employees. Following an initiative in 1986, a provision incorporated into California’s constitution established English as the official state language and declared further that the legislature “shall make no law which diminishes or ignores the role of English as the common language of the State of California.”<sup>128</sup> Moreover, California residents and businesses have standing to enforce these declarations.<sup>129</sup> Unofficially, California’s Attorney General interpreted the state’s constitution narrowly to permit other languages to accompany English in official publications.<sup>130</sup> In a

125. Michele Arington, Note, *English-only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 339 (1991) (arguing that courts should construe Official English laws as mere symbolic statements because of threat they pose to language minorities and because of concerns about fairness of initiative process employed to adopt some of these laws). *But see* Perea, *supra* note 109, at 367-68 (criticizing commentators who conclude that, as mere symbolic statements, Official English laws are constitutional and harmless, and arguing instead that racist cultural meaning of laws causes harm that offends Equal Protection Clause).

126. *See* Arington, *supra* note 125, at 339 (predicting that courts will apply overbreadth doctrine and interpret these laws narrowly).

127. *Puerto Rican Org. for Political Action v. Kasper*, 490 F.2d 575, 577 (7th Cir. 1973) (noting that despite provision, numerous agencies published some materials and provided some services in Spanish). After the passage of Colorado’s Official English initiative, Colorado’s governor and Denver’s mayor ordered that government policies on bilingual assistance would remain in effect. *See* BARON, *supra* note 103, at 20-21; *see also* Moran, *supra* note 22, at 792 (stating that “[t]he limited impact of official English amendments is derived, in part, from their vagueness: confronted with doubtful language, state and local administrators have tended to preserve existing bilingual services”).

128. CAL. CONST. art. 3, § 6(c) (stating that § 6(a) is also “intended to preserve, protect and strengthen the English language”).

129. *Id.* § 6(d). In 1990, Alabama voters approved an English language initiative substantially identical to the California provision. *See* ALA. CONST. amend. 509 (1990).

130. *See* *Ballot Translations Legal, Attorney General Says*, SAN JOSE MERCURY NEWS, May 23, 1987, at 7B (describing letter from California’s Attorney General John Van de Kamp to sponsors of California’s initiative explaining new law does not prohibit translations on voting ballots).

decision later vacated as moot, the Ninth Circuit interpreted California's law as "primarily a symbolic statement" that did not require Spanish-speaking government employees to speak English at work.<sup>131</sup> The court recognized, however, that should the legislature take action to implement the language law as the initiative directs,<sup>132</sup> then the Constitution "may conceivably have some concrete application to official government communications."<sup>133</sup> Since the adoption of the initiative in 1986, implementing legislation has been introduced regularly in the California legislature, but has not yet been enacted.<sup>134</sup>

In summary, authorities to date support the following tentative conclusions on the legal effect and validity of English language laws. In considering laws that merely declare English as the official language of government, courts will construe those laws as having no substantive legal effect on the provision of bilingual services. In contrast, laws that prohibit public employees, acting in their official capacity, from using a language other than English to serve constituents unable to speak English<sup>135</sup> contravene the First Amendment. A declaration that prohibits the government from requiring the use of a language other than English, however, might survive scrutiny if it does not conflict with federal law<sup>136</sup> or the constitutional rights guaranteed to criminal defendants.<sup>137</sup> The courts have not yet considered directly the urgings of many commentators that these and

131. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1044 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989) (vacated when complainant employee quit); *see also* *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 928 n.11 (9th Cir. 1995) (en banc) (observing that language laws of California and certain other states "appear to be primarily symbolic").

132. CAL. CONST. art. 3, § 6(c) (stating that "[t]he Legislature shall enforce this section by appropriate legislation," and noting further that legislature should also do whatever acts are needed to preserve and enhance English in California).

133. *Gutierrez*, 838 F.2d at 1044 (noting that lack of legislative action shows symbolic nature of provision). It is possible, however, that California's law may have more than a symbolic effect even without legislative action to implement it. For example, consider the improbable case of a motor vehicle department that refuses to offer its driver's test in English. Presumably, a California resident could sue to take the test in English whether or not implementing legislation has been enacted.

134. The most recent proposal to "enforce" California's language provision was introduced to the California legislature in February, 1996. *See* 1995 Cal. A.B. 2183, Reg. Sess. (1995-96).

135. In *Yniguez*, the defendant, Arizonans for Official English, argued that the plaintiff employee sought the right to speak Spanish at will regardless of the primary language of the recipient of services. 69 F.3d at 943. The court rejected this assertion because it viewed the plaintiff's free speech claim as based on her more narrow desire to speak Spanish to only those Spanish-speaking claimants. *Id.*

136. To avoid conflict with the federal Voting Rights Act and other federal laws that protect language minorities, Arizona's Constitution permits the use of languages other than English when necessary to comply with federal law. ARIZ. CONST. art. 28, § 3(2)(b).

137. *See supra* note 3 and accompanying text (discussing constitutional rights of criminal defendants).

the Official English laws contravene the Equal Protection guarantee.<sup>138</sup>

Should English language laws survive constitutional scrutiny, they could frustrate efforts to extend consumer protection to language minorities.<sup>139</sup> English-Only provisions in state constitutions that prohibit the state's legislature from requiring the use of languages other than English would preclude laws that require translation of consumer contracts and disclosures of essential terms. Even if enacted as statutes, rather than as amendments to a state constitution, English-Only laws can wreak havoc on consumer protection for language minorities.<sup>140</sup> Courts might construe these laws as repealing existing statutes that require bilingual consumer disclosures and contracts.<sup>141</sup> Moreover, these laws would prevent an administrative agency, such as the state's Attorney General Office, from exercising

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138. The Ninth Circuit did note that the equal protection ramifications of the Arizona language law lent "strong[] support" to its holding. *Yniguez*, 69 F.3d at 948 (noting that burden under provision does not fall evenly over population). Professor Perea extensively develops the equal protection case against these laws. See Perea, *supra* note 109, at 367-71; see also Califa, *supra* note 15, at 330-46 (arguing that federal English-Only law would not survive Equal Protection Clause challenge); Daniel J. Garfield, Comment, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 694-95 (1995) (arguing that English language laws adopted by initiative are unconstitutional because they affect fundamental right to participate equally in political process).

139. Although in *Yniguez* the Ninth Circuit struck down the entire Arizona law on First Amendment grounds, that law had no severability clause. 69 F.3d at 930-32 (stating text of provision). Moreover, the parties treated the legislation as a unit that would stand or fall as a whole. *Id.* As such, the decision does not necessarily reach language laws that do not prohibit government employees from dealing with non-English speaking constituents in a language other than English. Moreover, the Supreme Court may ultimately disagree with the Ninth Circuit's position.

140. Some reviewers of this Article have expressed doubts that these English language laws were intended to have the impacts on the consumer marketplace that this Article suggests. In rejecting the Arizona Attorney General's narrow interpretation of Arizona's English-Only law as "completely at odds" with its plain language, the *Yniguez* case is instructive in predicting the potential reach of these laws to all aspects of government. See *supra* notes 120-23. Certainly, these laws are not intended nor do they purport to govern private transactions such as those in the consumer marketplace. Nevertheless, their potential pervasive public reach holds implications for these private dealings as the discussion that follows suggests. In no way, however, does this Article intend to suggest that courts must or should construe the laws to the detriment of language minority consumers. Rather, these comprehensive English language laws are unconstitutional, either because they contravene the First Amendment if they restrict government speech or, as Professor Perea has urged, because they offend the Equal Protection Clause. See Perea, *supra* note 109, at 356-71.

141. The proposed federal Language of Government Act of 1995 provides that "[e]xcept where an existing law of the United States directly contravenes the amendments made by section 3 [declaring English the official U.S. language] (such as requiring the use of a language other than English for official business of the government of the United States), [the provisions of the proposed law] are not intended to repeal existing laws of the United States." S. 356, 104th Cong., 1st Sess. § 2 (1995). The impact of this provision on the FTC door-to-door and used car rules discussed in Part I.C.4 is uncertain.

its rulemaking authority to require translations in consumer transactions.<sup>142</sup>

These English-Only laws may also limit the authority of courts to dispense consumer justice to language minorities. For example, South Carolina's language statute prohibits any "order" or "decree" that "require[s]" the use of any language other than English.<sup>143</sup> Consider how a South Carolina court should resolve a claim that a merchant engaged in an unfair trade practice by failing to provide a translated contract following oral negotiations in Spanish.<sup>144</sup> Another interesting question is whether a court could conclude that a merchant has committed fraud by failing to translate an unfair contract term for a Spanish-Only Consumer.<sup>145</sup> In either case, a decision that favors the consumer arguably "requires" the use of a language other than English, creating a result presumably contrary to the English-Only law.

As shown, English-Only laws may impede the development of legislative, administrative, and judicial reforms to protect language minorities. Even the "symbolic" Official English laws may hinder reform. For example, one of the primary policy arguments made in favor of Official English (and English-Only) laws is that a multilingual government encourages immigrants to forego acquisition of English.<sup>146</sup> When urging legislation to require translated contracts and disclosures, consumer advocates will be met with the same claim that such reform runs counter to assimilation goals. Despite compelling arguments that the accommodation of other languages does not

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142. See *Mapco Int'l, Inc. v. Federal Energy Regulatory Comm'n*, 993 F.2d 235, 240 (Temp. Emer. Ct. App. 1993) (stating that administrative agency can only interpret statutes through regulations and decisions, not supersede them). In the absence of contradictory legislation, state agencies that are authorized to construe their state deceptive trade practice statutes could establish protections for language minorities. See Bender, *supra* note 94, at 650 (noting that more than half of states authorize rulemaking under these statutes).

143. S.C. CODE ANN. § 1-1-697 (Law. Co-op. Supp. 1994); see also ARIZ. CONST. art. 28, § 3(1)(b) ("No entity to which this Article applies [the legislative, executive, and judicial branches] shall make or enforce a law, order, decree or policy which requires the use of a language other than English.").

144. See *infra* Part III.C (discussing this potential claim under state unfair or deceptive trade practice acts).

145. See *infra* Part III.D.3 (discussing argument that merchant should have duty to make such disclosure). That discussion assumes an English-Only law does not constrain the court.

146. Elliot L. Judd, *The Federal English Language Amendment: Prospects and Perils*, in NOT ONLY ENGLISH 37, 39 (Harvey A. Daniels ed., 1990). But see Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 497 (1994) (noting, and later rejecting as permitting "undue advantage-taking," potential law and economics argument in favor of enforcing unconscionable bargains to motivate disadvantaged to read their contracts, become better educated, search for better terms in marketplace, and other similar goals).

discourage or delay the acquisition of English,<sup>147</sup> the adoption of Official English laws reflects the rhetorical power and political popularity of these assimilationist claims. The Official English argument that multilingual government frustrates assimilative goals may also impede judicial activism. For example, defendants might rely on an Official English law to urge that a court should not obligate a business to translate unfair contract terms in favor of language minorities.<sup>148</sup>

Given these potential impacts on consumer protection, consumer advocates should add their voices to those opposing the English language movement. Even when urged as a merely symbolic expression of patriotism,<sup>149</sup> English language laws are unsound because of their tangible impact on the development of consumer protection for language minorities. Once enacted, a "symbolic" Official English law may remain unchallenged on constitutional grounds due to its apparent lack of impact, yet still cause pernicious injury to language minorities.

147. *E.g.*, Note, "Official English": *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1360 (1987) ("Given the overwhelming social and economic incentives that already exist to learn English, the deprivation of bilingual services seems at most a small added incentive." (citations omitted)). Even if multilingualism policies could lessen the immigrant's incentive to learn English, it is not fair for government to encourage assimilation by declaring open season on immigrants while they learn English. *See* *Alfonso v. Board of Review*, 444 A.2d 1075, 1085 (N.J.) (Wilentz, J., dissenting), *cert. denied*, 459 U.S. 806 (1982). Judge Wilentz stated:

Some might think that the rule of the majority [by finding no constitutional basis to receive notice of unemployment appeal rights in Spanish] provides an incentive to learn English. No such incentive is needed, for every day of their lives provides Hispanic-Americans with innumerable, often devastating reminders of their disadvantaged position resulting from the language barrier they face. There is no carrot in this decision, only a stick.

*Id.* Affirmative policies designed to promote the acquisition of English, such as English education programs, would better address this concern of the official language law proponents. *See generally* Califa, *supra* note 121, at 347 (arguing that real motivation of those promoting English-Only laws is "cultural insecurity" and prejudice, not assimilation).

148. *See* *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423, 428-29 (Ct. App. 1992) (concluding that official language policy does not override consumer protection policies), *rev'd on other grounds*, 863 P.2d 167 (Cal. 1993). In *Ramirez*, defendant drug manufacturer argued that California's English language law abolished, for public policy reasons, a manufacturer's liability for failing to warn of product dangers in languages other than English. *See generally* Dillard, *supra* note 113, at 223 (discussing *Ramirez* and noting possibility of courts interpreting Official English amendment to constitution as support for assertion that legislature should not require use of languages other than English).

Looking back to the "harshly decided" cases of German-speaking immigrants by the Wisconsin Supreme Court in the 1870s to the early 1900s, Professor Macaulay has commented that the court's refusal to allow these immigrants to testify that their oral bargains differed from the written contracts served the social policy of integration by encouraging them to learn English. *See* Macaulay, *supra* note 48, at 1065-66 n.31 (citing cases from 1875-1901).

149. *But see* Perea, *supra* note 109, at 367-71 (arguing that Official English laws should not be treated as unobjectionable symbols of "national unity" because in fact they symbolize rejection of the Latino/a heritage and culture).

*B. Proposition 187 and Other Considerations in Choosing the Appropriate Legal Institution for Reform*

Legislation is the best vehicle to protect language minorities against the market's failure to translate their bargains. Professor Alan Schwartz and the late Professor Arthur Leff have led the attack on judicial efforts to remedy imperfection in consumer markets generally. Professor Leff viewed the case-by-case application of the judicial doctrine of unconscionability to regulate the quality of consumer transactions as an expensive and frustrating proposition.<sup>150</sup> Professor Schwartz has argued that courts are "relatively poor social institutions" to resolve problems of imperfect information in consumer markets.<sup>151</sup> He argues that legislatures are the institution best situated to promote the delivery of information to consumers through such policies as plain-language laws or statutes requiring the disclosure of relevant information.<sup>152</sup>

Considerations specific to language minorities also favor legislative solutions to the current market abuses. In a discussion of the appropriate forum for the articulation of language rights, Professor Moran has distinguished between positive and negative rights.<sup>153</sup> Moran argues that courts are well equipped to enunciate negative rights, which are guarantees that a person will not suffer discrimina-

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150. Arthur Allen Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356 (1970) (describing wasteful cycle that occurs when quality of goods is regulated on case-by-case basis). Addressing high pressure and deceptive door-to-door transactions, Professor Epstein has commented that the unconscionability doctrine may function "at best as a blunt instrument . . . and that it is better to adopt some legislative solution to control the problem." Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 305 (1975). I have argued elsewhere for a statutory standard of unconscionability that defers to the courts to judge the fairness of interest rates. Cognizant of these concerns, my proposal was offered as an alternative to the offensive effects of usury laws on freedom of contract. See Bender, *supra* note 46, at 743-44. Translation laws, in contrast, have little impact on the parties' freedom to self-determine their substantive bargain.

151. Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L.J. 437, 453 (1991) (arguing that because courts are not well suited to resolve market perfection problems, unconscionability doctrine should not be used often).

152. *Id.* at 441 (describing function of courts as one of interpreting contracts and function of legislature as responding to situations that create unfair consumer contracts). Schwartz argued elsewhere that administrative agencies can address information problems in consumer markets more effectively than courts. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 681 (1979) (listing three advantages as factfinding resources, potential power to order effective remedies to make markets more competitive, and more effective policing of disclosure schemes). Initiating a federal administrative solution to aid language minorities is problematic because of the plethora of federal agencies with jurisdiction over consumer transactions. For example, the FTC oversees finance companies, while the National Credit Union Administration oversees credit unions. Rather, federal legislation should be pursued with compliance enforced by the various federal agencies.

153. Moran, *supra* note 22, at 807.

tion based on an exercise of choice, such as the decision to speak Spanish in a restaurant or tavern.<sup>154</sup> The legislature is an “inapt forum” to articulate such negative rights because its “orientation to the give-and-take of special-interest politics”<sup>155</sup> is likely to favor “assimilative approaches [over] those that preserve linguistic difference.”<sup>156</sup> In contrast, positive rights, such as bilingual education programs, are better established by legislation followed by administrative enforcement.<sup>157</sup> Among other institutional constraints, “[c]ourts have limited resources to undertake enforcement of their decrees, and judges may not be able to oversee the broad-ranging structural reforms that implementation of a positive right requires.”<sup>158</sup> Because reform to require translations in consumer transactions establishes a positive right, Professor Moran’s analysis favors legislative intervention on behalf of language minorities.<sup>159</sup>

Moreover, judicial reluctance to protect language minorities from unsafe products supports legislative intervention. In establishing, as a matter of law, that an aspirin manufacturer had no duty to warn of product dangers in Spanish, the California Supreme Court inferred from legislative silence that the California legislature had deliberately chosen not to protect language minorities.<sup>160</sup> The court reasoned that deciding when product warnings in a language other than English are required is a task for which “legislative and administrative bodies are particularly well suited.”<sup>161</sup> The court assumed that this policymaking would require collection of empirical data and consideration of questions such as the cost of multilingual warnings

154. Moran, *supra* note 22, at 807, 813.

155. Moran, *supra* note 22, at 808.

156. Moran, *supra* note 22, at 813.

157. Moran, *supra* note 22, at 808-09; *see also* Leff, *supra* note 150, at 357 (raising possibility that more would be changed by specific statutes, backed up by administrative regulations, as opposed to establishing consumer protection through expensive process of case law).

158. Moran, *supra* note 22, at 808.

159. In *Yniguez*, the Ninth Circuit relied on the distinction between positive and negative rights to reject the language law proponent’s reliance on cases refusing to require government to provide bilingual services. *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 936-37 (9th Cir. 1995) (en banc). In contrast to those cases seeking judicial establishment of a positive right, the employee in *Yniguez* sought relief from the gag that Arizona’s language law placed on the free speech of government employees. *Id.*

160. *Ramirez v. Plough, Inc.*, 863 P.2d 167, 175 (Cal. 1993) (determining that legislature is “able and willing” to specify in what instances it requires non-English language communications); *see Lee, supra* note 19, at 1121-22 (describing measures by various states requiring foreign language communications, such as Arizona’s requirement that process servers provide notice of legal action in Spanish).

161. *Ramirez*, 863 P.2d at 174 (noting that California’s legislature already required multilingual warning in other areas). *But see* Linda M. Baldwin, Note, *Ramirez v. Plough, Inc.: Should Manufacturers of Nonprescription Drugs Have a Duty to Warn in Spanish?*, 29 U.S.F. L. Rev. 837, 867 (1995) (arguing that legislatures do not necessarily have superior technical and procedural resources to enact laws to protect language minorities from dangerous products).

and the number of persons likely to benefit from warnings given in a particular language.<sup>162</sup> The court cited many instances in which the California legislature had presumably engaged in such study to establish rights to bilingual information in public and private transactions, including consumer transactions.<sup>163</sup> The court also looked to a federal judge's comment that "[t]he extent to which special consideration should be given to persons who have difficulty with the English language is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts."<sup>164</sup> The potential that courts will defer to a legislature's failure to establish positive rights for language minorities compels legislative initiative.

As to whether Congress or a state legislature is better suited to establish positive rights for language minority consumers, consumer protection experience supports federal intervention. One commentator has debunked the view that state legislatures are best able to engineer consumer protection policy because they are familiar with the unique local concerns of businesses and consumers.<sup>165</sup> Arguing for a "completely preemptive federal takeover" of consumer credit regulation, Professor Jeffrey Davis maintains that creditors and consumers do not have unique local needs.<sup>166</sup> Similarly, in arguing for establishment of federal payment systems law, Professor Mark Budnitz contends that "[c]onsumer concerns are national in scope and require national solutions."<sup>167</sup> Moreover, in the state legisla-

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162. *Ramirez*, 863 P.2d at 176.

163. *Id.* at 174-75.

164. *Id.* at 178 (quoting *Carmona v. Sheffield*, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971) (concluding that unemployment claimants have no constitutional right to Spanish language services from government)), *aff'd*, 475 F.2d 738 (9th Cir. 1973)); see also *State v. Olivo*, 337 N.E.2d 904, 910 n.6 (Mass. 1975) (stating that if translating notices to vacate public housing into other languages is "desirable," then "it should be done by legislative action and with carefully delineated rules and guidelines. It is not appropriate for this court to enter so difficult and obscure an area without legislative mandate"); *Alfonso v. Board of Review*, 444 A.2d 1075, 1077 (N.J.), *cert. denied*, 459 U.S. 806 (1982). In *Alfonso*, the court stated:

The decision to provide translation [of unemployment appeal rights], encompassing as it does the determination of when a translation should be provided, and to whom, and in what language, is one that is best left to those branches of government that can better assess the changing needs and demands of both the non-English speaking population and the government agencies that provide the translation.

*Id.*

165. Jeffrey Davis, *Revamping Consumer Credit Contract Law*, 68 VA. L. REV. 1333, 1349 (1982) (stating that assumption that unique concerns exist locally for creditors and consumers is basis of theory that states are better suited to regulate in this area).

166. *Id.* at 1349.

167. Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827, 851 (1992) (arguing that regulatory power in consumer protection area belongs at federal level).



tures, consumer groups are often less influential than the special interest groups that represent businesses.<sup>168</sup> In contrast, national consumer organizations are most effective before Congress.<sup>169</sup>

The English language movement poses additional obstacles, both legal and political, that make federal intervention crucial. In those states with comprehensive English language laws adopted as constitutional amendments, notably California, state legislatures may be unable to establish positive consumer protection rights for language minorities.<sup>170</sup> Under the Supremacy Clause,<sup>171</sup> Congress could override these state provisions.<sup>172</sup>

Another obstacle to reform in the state legislatures is the anti-immigrant political climate that exists in many states with large immigrant populations. In California, for example, this attitude prompted both the 1986 Official English constitutional amendment<sup>173</sup> and 1994's Proposition 187. Although both these laws were adopted by initiative<sup>174</sup> rather than through legislation, it is unlikely that California's legislature will enact any positive rights to protect its immigrant population.<sup>175</sup> Although the concentration of language minorities in certain states may argue for localized solutions, local solutions are now politically unfeasible in most of those states. Therefore, in order to protect Spanish-Only Consumers and other language minorities, Congress must act.<sup>176</sup>

168. See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 148 (1993) (commenting that state legislative forum often favors special interest groups' concerns as opposed to interests of consumers).

169. Budnitz, *supra* note 167, at 850 (citing Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551, 588-89 (1991)).

170. See *supra* Part II.A (discussing potential for English language laws to impede consumer protection).

171. U.S. CONST. art. VI, § 2, cl. 2.

172. For examples of existing federal preemption of state language laws in the areas of voting and bilingual education, see Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17, 45-49 (1990) (discussing challenge to federal bilingual programs by state English-Only legislation).

173. CAL. CONST. art. III, § 6.

174. See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (commenting on California's initiative process that produced Proposition 187).

175. In 1995, California's legislature did require the state Insurance Commissioner to develop and distribute explanations of automobile insurance policies in Spanish and Vietnamese. See C.A. A.B. 1150, Reg. Sess. (1995-96) (specifying that these requirements impose no duty on insurers to provide insurance policies in non-English language).

176. Some commentators might express concern that a national language policy is unfair to businesses in states with small language minority populations. Language policies, however, could account for such variations. For example, legislation could be based on the federal Voting Rights Act that requires non-English voting materials in just those political subdivisions that meet a prescribed numerical threshold. See *infra* note 201 (noting minority population threshold of 10,000 or 5%). For a discussion of various approaches to decide the question of which language

Although Congress is the appropriate institution to establish positive rights for language minorities in their consumer transactions, other considerations compel reforms in every institution, legal and nonlegal. Congress too could fall victim to the anti-immigrant agenda.<sup>177</sup> Should it pass the proposed Language of Government Act of 1995 or similar legislation,<sup>178</sup> subsequent federal enactments of consumer protection for language minorities would contradict that legislation and be politically unfeasible. In fact, because the Act as introduced would not preempt state law,<sup>179</sup> the same factors necessitating congressional leadership in consumer language law reform support the need for simultaneous state reform.

Positive rights that Congress or the states establish may ultimately fail to protect every language minority.<sup>180</sup> Moreover, as the archetypical design of consumer protection regulation, disclosure laws may not address the needs of language minority consumers who are not literate in their native language.<sup>181</sup> Finally, the current political climate may frustrate any source of legislative reform.<sup>182</sup> Therefore, this Article considers and proposes reforms in other institutions, as well as designs for legislative reforms, that are facially applicable to consumers generally and therefore removed from any anti-immigrant backlash.

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minorities should be protected by consumer protection reform, see *infra* Part II.D (outlining various state and federal statutory standards referred to as Language of Consumer Standard, Language of Bargain, Language of Solicitation, Variable Language Threshold, Fixed Language, and combination approaches). Moreover, a federal agency could be authorized to grant exemptions in those states with small language minority populations. See *supra* note 84 (discussing exemptions granted by FTC from its used car rule in these circumstances).

177. In addition to English language legislation, the 104th Congress is considering legislation to tighten immigration laws and limits. See S. 1394, 104th Cong., 1st Sess. (1995) (amending Immigration and Nationality Act). See generally Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 409 n.3 (1995) (describing various punitive federal and state measures directed towards immigrants).

178. See *supra* note 115 and accompanying text (discussing various federal English-Only legislative proposals).

179. S. 356, 104th Cong., 1st Sess. § 4 (1995).

180. See *infra* Part II.D (noting approaches to language reform that may fail to protect every language minority).

181. See *infra* Part II.E (commenting on deficiencies in market perfection paradigm).

182. Cf. Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 225-28 (1993) (arguing that because current restrictive political trend makes congressional protection against racial discrimination unlikely, courts should expand common law of contracts to embrace broad antidiscrimination principle). Establishing positive rights of language minorities to receive translated consumer contracts might also be attacked as unduly burdensome to small business and generally as antithetical to the movement to curb government regulation of business.

C. *Racial Discrimination in Consumer Markets: Are Language-Based Solutions Too Narrow?*

Reformers must consider whether solutions addressing marketplace language barriers miss the mark. Perhaps reform should aim to eradicate all forms of racial discrimination in consumer markets. Examples such as the water purification sales scheme<sup>183</sup> lend support to broader reform. In this instance, a scam targeting Spanish-speaking Latinos/as exploited not just the language barrier, but also Latinos/as' "almost religious quest" for pure water and their hesitancy to complain to government authorities.<sup>184</sup>

Because continued immigration and an active anti-immigrant climate present increased opportunities for racial discrimination against Latinos/as in consumer markets, consumer and Latino/a advocates may hope for comprehensive reform. While not opposing comprehensive solutions, this Article aims to isolate and address the narrower issue of how to level the language playing field. Experience under the Equal Credit Opportunity Act (ECOA)<sup>185</sup> demonstrates that broad-brush efforts targeting racial discrimination through the creation of negative rights often fail to influence consumer markets. Among other problems, racial discrimination is difficult to prove under the ECOA and similar acts.<sup>186</sup> As a result, most ECOA claims rely on technical provisions that create bright line standards for compliance.<sup>187</sup> Because violations of more narrowly drawn positive rights are easier to establish, they are likely to have more deterrent influence on merchants than are vague, admonitory laws. Professor Whitford has argued persuasively that "increasing the specificity" of consumer legislation yields greater voluntary compliance by mer-

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183. See *supra* notes 39-40 and accompanying text (describing inducement of Mexican family to purchase overpriced water purification system).

184. DAVIS, *supra* note 11, at 183. In this scenario, the discrimination may stem from economic opportunism but it could also be driven by animus toward Latinos/as, particularly given the current political climate in which Spanish speakers are often viewed as undocumented immigrants. This Article generally does not attempt to discern the motive of the discrimination. Cf. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 845-47 (1991) (concluding that discrimination encountered by blacks and women in empirical study of car market appears to be revenue-based, but also indicates animus).

185. 15 U.S.C. §§ 1691(a)-(f) (1994).

186. See *infra* Part III.B.2 (noting application of ECOA to language-based practices).

187. See Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1479-84 (1994) (urging reform of banking law to adopt community-empowerment paradigm instead of failed equality model in ECOA). An example of a positive right under the ECOA is the right to receive notification of the reasons for an adverse credit decision. 15 U.S.C. § 1691(d).

chants.<sup>188</sup> Targeting language barriers with translation laws is the type of specific regulation that is likely to produce acceptable levels of compliance.

The apparent strength of the English language movement might argue for solutions that avoid direct focus on language issues. However, any broader attack on racial discrimination in consumer markets is likely to encounter allied prejudices: the anti-immigrant sentiment behind California's Proposition 187 and the anti-minority backlash apparent in current efforts to dismantle affirmative action.<sup>189</sup>

Although it offers language-based solutions, this Article proposes strategies that may have broader impact on racial and ethnic discrimination in consumer markets. For example, aggressive public enforcement against language fraud practiced on Spanish-Only Consumers<sup>190</sup> should send merchants the more general message that there is no open season on Latinos/as—any scam that victimizes them will prompt enforcement action.

*D. Should Protection of Language Minorities Be Language-Neutral or Language-Specific?*

Reforms that protect the Spanish-Only Consumer may be met with the English language movement's policy argument that accommodating a single language minority group itself discriminates against other language minorities.<sup>191</sup> Pointing to the existence of over 4000 world languages<sup>192</sup> and to the approximately 298 languages other than English spoken in American homes,<sup>193</sup> this argument assumes that fairness compels all-or-nothing solutions. Not surprisingly, in the

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188. William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 Wis. L. Rev. 1018, 1042.

189. See John Boudreau, *Effort to Outlaw Affirmative Action Promoted in California; Civil Rights Groups See Initiative as Political-Cultural Grenade*, WASH. POST, Dec. 27, 1994, at A3 (discussing upcoming initiative in California to outlaw state government affirmative action programs).

190. See *infra* Part III.F.2.

191. See FERNANDO DE LA PEÑA, *DEMOCRACY OR BABEL: THE CASE FOR OFFICIAL ENGLISH* 62 (1991) (suggesting that government could not provide services for one language group without providing them for all language minorities); *Facts & Issues* (U.S. English, Washington, D.C.) (urging that to add some languages other than English for government business discriminates against remaining languages) (on file with *The American University Law Review*).

192. BARON, *supra* note 103, at 31 (citing RONALD WARDBAUGH, *LANGUAGE IN COMPETITION: DOMINANCE, DIVERSITY AND DECLINE* 22 (1987)).

193. See Lee, *supra* note 19, at 1109 n.7 (noting numbers of American non-English language speakers based on 1990 census); cf. *Ramirez v. Plough, Inc.*, 863 P.2d 167, 170 (Cal. 1993) (noting that litigants agreed, in product liability case, that more than 148 languages are spoken in the United States).

realm of government services, this rhetoric usually favors the latter.<sup>194</sup>

As a policy argument, however, this claim is nonsense. It overlooks the plain fact that any choice to conduct government business only in English discriminates against all other languages. Moreover, indigenous languages and Spanish were in use in America before the introduction of English.<sup>195</sup> The dominant status that the English language now enjoys is not an American birthright. Instead, the language movement urges English as the sole language of government because of its now overwhelming use by Americans.<sup>196</sup> This approach apparently assumes that at some point a numerical threshold was crossed that requires government to operate in English. There is no good reason why the threshold must admit only English, however, when there is an enormous gap between Spanish, the second most spoken language in American homes, and other languages. As reported by the 1990 census, there are 17.3 million Spanish-speakers in America, trailed by speakers of French at 1.7 million, German at 1.5 million, Italian at 1.3 million, and Chinese at 1.2 million.<sup>197</sup> These circumstances establish a strong case for the recognition of English and, at least, the Spanish language in the provision of government services and also in consumer settings.

Of the current approaches the law uses to extend positive rights to language minorities as consumers, some are language neutral because under the circumstances any language minority might qualify. Others protect a single language minority group (usually Spanish-speakers), while others strike a middle ground. These approaches include:

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194. See *Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir. 1975). In *Frontera*, the court stated:

If Civil Service exams are required to be conducted in Spanish . . . what about the numerous other nationality groups which inhabit metropolitan Cleveland? These other nationality groups would have just as much right as Frontera [plaintiff] to have their examinations conducted in their own languages.

. . . This would, of course, be at the expense of the city . . . and would ultimately be saddled upon the harried taxpayers of Cleveland.

*Id.*; see also *Guerrero v. Carleson*, 512 P.2d 833, 837-38 (Cal. 1973) (rejecting constitutional challenge to English notices of welfare termination in part because of concern that to require notice in Spanish would entitle other language minorities to same accommodation), *cert. denied sub nom. Guerrero v. Swoap*, 414 U.S. 1137 (1974).

195. See generally MATT S. MEIER & FELICIANO RIBERA, MEXICAN AMERICANS/AMERICAN MEXICANS 21 (1993) (noting establishment of Spanish settlement in Nuevo México (now part of New Mexico and other American states) nine years before English established Jamestown).

196. See Califa, *supra* note 15, at 293-95 (noting general perception among Americans that English is dominant language).

197. See *Americans Speaking Languages Other Than English*, available in WL, Cendata file, RN 05 99 02 120, Sept. 21, 1993.

(1) protecting any consumer whom the merchant knows or has reason to know is unable to understand English (the Language of the Consumer Standard);<sup>198</sup>

(2) protecting any consumer with whom the merchant negotiates in a language other than English (the Language of the Bargain Standard);<sup>199</sup>

(3) protecting any language minority group that the merchant has targeted in non-English advertising (the Language of the Solicitation Standard);<sup>200</sup>

(4) protecting any language minority group that represents more than a specified percentage of the population or of the merchant's past customers (the Variable Language Threshold Standard);<sup>201</sup>

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198. See CAL. CODE REGS. tit. 16, § 3840 (1985) (requiring immigration consultants to provide disclosures in English and language of client); MASS. REGS. CODE tit. 940, § 8.05 (1987) (requiring mortgage brokers and lenders to take "reasonable steps," such as using interpreters or supplying translations, to communicate material facts of loan transaction in language borrower understands); cf. ILL. ANN. STAT. ch. 20 para. 1015/8.2 (Smith-Hurd 1993) (instructing that non-resident farmworkers must be given summary of Illinois labor laws in English and language in which worker is fluent). A Massachusetts regulation prohibits a door-to-door seller from inducing a purchaser to sign documents that the seller knows or has reason to know the purchaser "is unable to read" or does not understand. MASS. REGS. CODE tit. 940, § 3.09(6) (1987). In order to comply with this regulation, sellers dealing with a language minority would have to translate any purchase documents.

199. The FTC door-to-door rule and state law counterparts to that rule use this approach. See 16 C.F.R. § 429.1 (1995) (noting that sales contracts must be furnished in same language in which oral negotiations transpire); see also *supra* note 96 (citing state counterparts).

200. See, e.g., CAL. GOV. CODE § 8219.5 (West 1992 & Supp. 1995) (requiring inclusion of translated disclosure in advertisements by non-attorney notary publics in languages other than English); CONN. AGENCIES REGS. § 42-110b-21 (1975) (mandating non-English advertisements must make any required disclosures in that language); FLA. ADMIN. CODE ANN. r. 61B-8.003 (1992) (stating subdivision public offering statements in land, condominium, and mobile home sales must be translated into any language of advertisements); ILL. ANN. STAT. ch. 765, para. 85/6 (Smith-Hurd 1993 & Supp. 1995) (requiring that land and mobile home sales transactions must be translated into advertised language); NEB. REV. STAT. § 69-1604 (1990) (stating that merchant must give cancellation notice form in door-to-door sales in language other than English if seller regularly uses that other language in any advertising); N.J. STAT. ANN. § 17:16C-100(d) (West 1984) (requiring home repair contractors who advertise in language other than English to provide one receipt in other language); WIS. STAT. ANN. § 423.203 (West Supp. 1994) (specifying same provision for cancellation notice in "consumer approval transactions").

201. The federal Voting Rights Act employs a variation of this approach. As reauthorized in 1992, that Act requires non-English voting materials if at least 10,000 or five percent of a state or political subdivision's voting age citizens are (1) members of a single language minority defined as American Indians, Asian Americans, Alaskan Natives, or those of Spanish "heritage," (2) unable to speak or understand English adequately for purposes of the electoral process, and (3) have a rate of failure to complete the fifth primary grade that exceeds the national rate. 42 U.S.C. § 1973aa-1a (1994). The Act is also triggered if the political subdivision contains an Indian reservation on which more than five percent of the American Indian or Alaskan Native voting age citizens are members of a single language minority meeting the latter two requirements. *Id.* at (b)(2)(A)(i)(III).

(5) protecting only those members of a designated language minority group(s) (usually Spanish-speakers) (the Fixed Language Standard);<sup>202</sup> and

(6) some combination of these approaches.<sup>203</sup>

Language-neutral approaches include the Language of the Consumer, Bargain, and Solicitation Standards. They stand in contrast to those approaches that, by design, fail to protect at least some language minority groups—the Variable Language Threshold and the Fixed Language Standards. Each of these approaches has its own unique advantages and shortcomings.

Rarely employed, the Language of the Consumer Standard would require businesses to determine whether each consumer can understand English and, if not, to translate any required disclosures and the written contract. Merchants likely would oppose this standard with horror stories of the cost and inconvenience of translating their contracts into every language that their customers might conceivably speak. Moreover, merchants might object to the burden placed on them to determine when their customers are unable to understand English. In practice, however, these concerns are overstated. In most locations, it is unlikely that merchants will encounter more than a few predictable language minority groups. Because the legislature should limit any translation requirement to significant consumer transactions above a floor dollar amount,<sup>204</sup> in the rare event that a business bargains with an unanticipated language minority there will likely be sufficient opportunity to obtain a translation before the transaction is concluded. Public or private intermediaries could provide speedy

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202. See ARIZ. REV. STAT. ANN. § 6-651(A) (Supp. 1995) (requiring consumer loan licensees to provide Truth in Lending disclosures in Spanish on request); *id.* § 6-1411 (Supp. 1995) (mandating premium finance company licensees to provide Truth in Lending disclosures in Spanish on request); CAL. CIV. CODE § 1799.91 (West 1992 & Supp. 1995) (requiring lenders to provide Federal Credit Practices Rule disclosure to consumer cosigners in English and Spanish).

203. For example, the FTC Used Motor Vehicle Trade Regulation Rule employs both the Fixed Language and Language of the Bargain approaches in requiring the delivery of warranty disclosures in Spanish whenever the merchant conducts a sale in Spanish. 16 C.F.R. § 455.5 (1995).

204. See *infra* note 290 and accompanying text (noting cost-benefit considerations in translating consumer documents). When using the Language of the Consumer Standard, legislatures should also exclude those disclosures that are mass-mailed to prospective customers, such as the Truth in Lending disclosures that must accompany credit card solicitations. 15 U.S.C. § 1637 (1994); *cf.* Charles F. Adams, Comment, "Citado a Comparecer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?, 61 CAL. L. REV. 1395, 1414 n.95 (1973) (urging that complainants send notice of legal proceedings in language of recipient when they know of language barrier, but that Spanish surname alone should not compel investigation of recipient's language ability).

translations to address this concern, as might on-line services or software programs.<sup>205</sup>

A more valid drawback of the Language of the Consumer Standard results from its emphasis on whether the merchant knows (or, perhaps, has reason to know) of the consumer's inability to understand the English contract. This standard will prompt the cautious merchant to probe affirmatively its customer's English ability.<sup>206</sup> Unfortunately, the current anti-immigrant climate is likely to undermine this process. First, the Spanish-Only Consumer may be inclined to overstate her English language ability because of the stigma attached by the English language movement to the failure to understand English.<sup>207</sup> The current anti-immigrant climate may cause the same exaggeration because Spanish-speakers are assumed to be undocumented immigrants. Moreover, laws such as California's Proposition 187 may require Latinos/as (and others) to verify their immigration status on demand. Latinos/as might perceive questions about their English language ability as attempts to verify their immigration status or as a precursor to discrimination targeted at Latinos/as.<sup>208</sup> Perhaps posting prominent signs in Spanish that address the right to translations would alleviate some of the concerns that are particularly acute for the Spanish-Only Consumer.<sup>209</sup> Still,

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205. See *infra* note 450 and accompanying text (discussing technological advances in translating). Admittedly, it might cost more to obtain these rare bargain-specific translations that merchants cannot use in multiple transactions.

206. Merchants probably would add some disclaimer to their contracts that the customer is able to understand English. It is uncertain what deference the law would give these disclaimers.

If a state law employs the Language of the Consumer Standard, lenders might be concerned whether probing the loan applicant's ability to understand English violates the Equal Credit Opportunity Act (ECOA). Regulations under the ECOA prohibit the creditor from inquiring about the applicant's race or national origin. 12 C.F.R. § 202.5(d)(5) (1995). Lenders who probe the applicant's language abilities in order to help discern the applicant's race or national origin may violate the ECOA, but lenders under a Language of the Consumer Standard probably have a sufficient justification to probe for purposes of providing a translation. See *infra* Part III.B.2 (discussing standards for ECOA liability).

207. Cf. Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES, Aug. 30, 1995, at A9 (reporting remarks of Texas judge in child-custody case who likened Latina mother's conversations with her five year-old daughter in Spanish to child abuse, sparking fear that speaking Spanish could have legal consequences).

208. Another problem with the Language of the Consumer Standard is the uncertain point at which a language minority is sufficiently able to understand English to relieve the merchant of the duty to translate. If the consumer appears only partially able to bargain in English, but has some ability, the merchant may be concerned that he will offend the consumer if he questions her English ability.

209. Cf. ARIZ. REV. STAT. ANN. § 6-651(A)(2) (Supp. 1995) (requiring consumer loan licensees to display conspicuous sign stating lender will provide federal Truth in Lending disclosures in Spanish on request); CAL. CIV. CODE § 1632(c) (West 1985 & Supp. 1995) (requiring posting of Spanish-language notice of translation rights by persons regularly conducting business in Spanish). Because displaying signs in every language might undercut their effectiveness, any sign requirement should be limited to Spanish or to a few languages.



the cautious merchant would want to assure himself of the consumer's English ability unless legislation relied on such signs to shift responsibility to the consumer to protect her own interest.

Legislatures that create positive rights for consumer language minorities usually employ the Language of the Bargain Standard. Because this standard looks to the language of the oral bargain, merchants can predict and control when and in which language(s) they must provide translations. This greater certainty, however, leads to several shortcomings. First, despite its facial neutrality, the standard is not language neutral in practice: a merchant can determine which language minority groups it will accommodate and refuse to bargain in any other languages. Second, by negotiating a bargain in English when a consumer is able to struggle through price and other simple deal terms, a merchant can escape the duty to translate the more complex provisions of the written documents and consumer disclosures even when it knows the consumer cannot comprehend them.

Most statutes that employ the Language of the Bargain Standard aggravate these problems by limiting the merchant's translation duty to just those transactions negotiated "primarily"<sup>210</sup> or "principally"<sup>211</sup> in a language other than English. Therefore, merchants might elude the duty to translate even when they conduct some part of the negotiation in a language other than English. Statutes that look to the "primary" or "principal" language of the negotiation also engage the court in an undisciplined weighing of the English and non-English components of the negotiation process.<sup>212</sup> Statutes that require translations when the business "conducts" a bargain in a language other than English are equally vague.<sup>213</sup> To avoid these difficulties, legislatures employing the Language of the Bargain

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Although this approach may seem contrary to the language neutrality of the Language of the Consumer Standard, it is a wise compromise to make that standard work better for the common language minority groups.

210. CAL. CIV. CODE § 1632 (West 1985 & Supp. 1995).

211. Most of the state door-to-door sale statutes use this standard. See *supra* note 96 and accompanying text.

212. Cf. *Yates Ford, Inc. v. Benavides*, 684 S.W.2d 736, 739-40 (Tex. Ct. App. 1984) (finding sufficient evidence to support trial court finding that Spanish was primary language of oral sales presentation after reconstructing entire oral bargain for purchase of car). Unlike the Language of the Consumer Standard, it appears irrelevant under the Language of the Bargain Standard whether the consumer that bargains in another language is in fact fluent in English, although the merchant may point to the consumer's fluency in English to cast doubt on the consumer's claim that she struck the entire oral bargain in a language other than English. Of course, a statute might expressly call for a finding that the consumer was not fluent in English.

213. See ILL. ANN. STAT. ch. 815, para. 505/2N (Smith-Hurd 1993) (holding failure to provide copy of unexecuted contract in language of negotiation unlawful); 16 C.F.R. § 455.5 (1995) (specifying when used car warranty disclosures must be provided in Spanish).

Standard should require translations if "any portion" of the transaction is negotiated in a language other than English.<sup>214</sup>

The Language of the Bargain Standard works best when conjoined with the Language of the Solicitation Standard.<sup>215</sup> This combination prevents manipulation of the Language of the Bargain Standard by merchants who lure language minorities with non-English advertising and then negotiate deals in simple English to avoid any translation requirement.<sup>216</sup> In the related area of dangerous product warnings, commentators have urged courts to adopt the Solicitation Standard.<sup>217</sup> Presumably manufacturers will object to any standard that looks to the language of the ultimate purchaser because it would overwhelm them with the duty to label in every potential language. By limiting the duty to warn to just those language minorities whose markets they entered with advertising, the Solicitation Standard, when operating alone, overcomes this objection.<sup>218</sup> For significant consumer transactions that involve oral bargaining, however, it is reasonable to extend the duty to translate to those transactions negotiated in languages other than English or, perhaps, to transac-

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214. See OR. REV. STAT. § 646.249(5) (1993) (requiring translation of rent-to-own disclosures if "any portion of the transaction is conducted in a language other than English").

215. In 1973, California's Governor Ronald Reagan vetoed a consumer translation bill requiring translations when the merchant advertised in Spanish. See 1973 Cal. A.B. 212, Reg. Sess. (1973-74). Apparently, Reagan did so because Spanish-language broadcasters feared they would lose Spanish advertising from merchants who did not wish to undertake the duty to translate. See Carl P. Blaine, *Breaking the Language Barrier: New Rights for California's Linguistic Minorities*, 5 PAC. L.J. 648, 671 (1974) (suggesting that legislature address broadcasters' concern by shifting focus from advertising to that of language used in conducting transaction, which legislature did in 1974 legislation).

216. See NEB. REV. STAT. § 69-1604(3) (1990) ("A seller who in the ordinary course of business regularly uses a language other than English in any advertising or other solicitation of customers . . . or in any face-to-face negotiations . . . shall give the [home solicitation sale cancellation] notice . . . to a buyer whose principal language is such other language, both in English and in the other language."). The FTC's Used Motor Vehicle Trade Regulation Rule provides that merchants who "conduct" a sale in Spanish must translate the warranty disclosure. 16 C.F.R. § 455.5 (1995). The FTC Staff Compliance Guidelines state that this requirement is triggered if the dealer expects to conduct sales in Spanish. 52 Fed. Reg. 18,552-02 (1987). To evidence this intent, the FTC will look to advertisements in Spanish language newspapers and telephone books, and to "Se Habla Español" signs. *Id.*

217. Cf. Michael S. Jacobs, *Toward a Process-Based Approach to Failure to Warn Law*, 71 N.C. L. REV. 121, 153-54 (1992) (noting need to warn non-English speakers of product risks); Lee, *supra* note 19, at 1139.

218. See Lee, *supra* note 19, at 1139 ("An appropriate balance, therefore, is to subject manufacturers to liability, as a matter of law, when they purposefully avail themselves of non-English speaking markets and then fail to warn in those markets in the language consumers speak."). A Florida federal district court opinion suggested this approach in 1992. It concluded that the jury should decide whether English warnings were adequate when the injured Nicaraguan product users could not read English and the manufacturer had employed the Latino/a media to advertise the product. *Stanley Indus., Inc. v. W.M. Barr & Co.*, 784 F. Supp. 1570, 1575-76 (S.D. Fla. 1992).

tions where the business knows or has reason to know that the consumer cannot understand English.<sup>219</sup>

Two alternate approaches are the Variable Language Threshold and the Fixed Language Standards. Unlike transaction-linked standards, these alternatives offer no protection to language minorities that do not meet their thresholds.<sup>220</sup> Language minority groups that are protected, however, are spared the problems of proof under the other standards; for either approach it is immaterial whether the merchant knows the consumer is unable to understand English (the Language of the Consumer Standard),<sup>221</sup> negotiates some portion of the bargain in a language other than English (the Language of the Bargain Standard), or advertises to the particular language market (the Language of the Solicitation Standard).

When employed in consumer settings, however, the Variable Language Threshold and Fixed Language Standards are usually combined with the Language of the Bargain Standard. For example, the FTC used car rule requires that merchants translate warranty disclosures in transactions "conducted" in Spanish, but not those conducted in other languages.<sup>222</sup> A Florida regulation requires translation of documents in deals negotiated principally in a language other than English, but only if the language minority group accounts for five percent or more of the merchant's transactions at the particular business location.<sup>223</sup> Under Florida's merchant-specific threshold, language minorities are never certain whether a merchant who does not deliver translations has nonetheless triggered the

219. In the area of product warnings, one commentator suggested that labels with too many languages can intimidate or confuse consumers, causing them to ignore the disclosures. See Jacobs, *supra* note 217, at 153-54 (noting that purpose of failure to warn doctrine is to articulate risks intelligibly to consumers). By contrast, significant consumer transactions that involve individualized bargaining allow for transaction-specific translations that avoid this scenario.

220. In the case of the Fixed Language Standard, the threshold is implicit in the designation of one or more (but less than all) languages for protection.

221. The District of Columbia Court of Appeals held that a landlord's failure to deliver both English and Spanish notices to quit as required by a Fixed Language Standard was excused when the commercial tenant understood English. *Ontell v. Capitol Hill E.W. Ltd. Partnership*, 527 A.2d 1292, 1295 (D.C. 1987). Courts that construe this standard (or the Variable Language Threshold Standard), however, should refuse to consider whether the consumer in fact could understand English. If the legislature intends to add this decision point, it will do so explicitly. For a case that illustrates the court's often difficult task in assessing the consumer's language ability, see *Cheshire Mortgage Serv., Inc. v. Montes*, 612 A.2d 1130, 1136 (Conn. 1992) (holding that trial court did not err in concluding that Puerto Rican borrowers understood English loan documents though one testified she could not read or write in any language and other testified he could speak English only a "little bit").

222. 16 C.F.R. § 455.5 (1995); see also TEX. ADMIN. CODE tit. 7, § 1.15 (1976) (requiring regulated loan licensees to provide Spanish loan contract disclosures when "all or a majority of the negotiations" are in Spanish).

223. FLA. ADMIN. CODE ANN. r. 2-9.005 (1995).

translation threshold.<sup>224</sup> To avoid proof problems, thresholds should be unrelated to particular merchants, such as a standard based on state or county population.<sup>225</sup> These population-based thresholds help to create a consumer expectation of translations in covered regions based on the conduct of other merchants in the area. Once established, this expectation helps consumers to identify and seek redress from merchants who fail to comply with the translation law.<sup>226</sup>

Instead of using the Variable Language Threshold or the Fixed Language Standard to limit the reach of the Language of the Bargain Standard, legislatures should consider using one of these language-specific standards to augment protection under a transaction-specific standard. For example, the legislature could require translations into Spanish in every transaction (Fixed Language Standard) together with any other language in which the merchant negotiates a particular transaction (Language of the Bargain).

In selecting the appropriate standard to protect language minorities, the following general considerations are relevant: (1) the type

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224. Presumably, the cautious merchant will need to determine the language of each of its customers to ascertain those languages that exceed the threshold. This inquiry raises the same problems as those under the Language of the Consumer Standard. See *supra* notes 206-09 and accompanying text (discussing how current anti-immigrant climate would undermine this inquiry process).

225. In addition, legislatures should avoid articulating the threshold in such vague terms as the language "prevalent" in the county. Cf. CAL. WELF. & INST. CODE § 18915 (West 1991) (requiring food stamp materials be made available in English, Spanish, and any other "non-English language prevalent in each county"); see also 7 C.F.R. § 1944.555 (1995) (stating FHA tenant grievance procedure providing translated notice to tenants when there is "concentration" of non-English speaking persons); 24 C.F.R. § 50.25 (requiring notice of NEPA hearing will be bilingual if affected public is "largely" non-English speaking); 47 C.F.R. § 76.75(a)(1) (stating that notice of cable television employee equal employment opportunity rights should be posted in Spanish when "significant percentage" of employees are Hispanic); OR. REV. STAT. § 471.551 (1993) (requiring that tavern alcohol warning signs include language other than English if "significant number of patrons" use that language).

Another problem inherent in this Variable Language Threshold Standard is choosing the appropriate percentage or numerical threshold for protection. California's use of this standard suggests that the appropriate threshold may vary depending on the context. See CAL. EDUC. CODE § 48985 (West 1993) (requiring 15% non-English speaking student body for bilingual public school notices); CAL. ELEC. CODE § 1635 (West 1977) (providing that 3% non-English speaking population triggers efforts to recruit bilingual election officials); CAL. GOV'T CODE § 53112 (West 1983) (requiring 5% non-English speaking population for bilingual emergency 911 operators); CAL. HEALTH & SAFETY CODE § 1113 (West 1990) (requiring 10% non-English speaking population for bilingual family planning pamphlets); CAL. HEALTH & SAFETY CODE § 1599.74 (West 1990) (invoking 1% threshold for purposes of translating nursing home patient bill of rights). To add to merchants' certainty, some administrative agency might provide notice to affected merchants when a percentage or numerical threshold is satisfied for a particular language minority group.

226. Although somewhat merchant-specific because of merchants' ability to dictate the language of the oral bargain, the Language of the Bargain Standard at least creates the expectation that the consumer will receive written translations whenever oral negotiations occur in a language other than English.

of forum selecting the standard and the need to distinguish between positive and negative rights; (2) the nature of the consumer transaction for which protection is sought; and (3) in targeting Latinos/as for protection, the diversity of their native languages and the differences in dialect of Spanish-speaking persons.

The standard employed may turn on whether the consumer seeks negative rights from the courts or positive rights from the legislatures. For example, a legislature may decide to require translations of bargains with any language minority group that exceeds a numerical threshold. A court is unlikely, however, to adopt such a bright-line standard.<sup>227</sup> Moreover, the appropriate standard may be different for Congress than for the state legislatures. For example, if choosing between the Fixed Language and the Variable Language Threshold Standards, Congress is more likely to employ the latter standard to address national diversity,<sup>228</sup> whereas the individual states might employ the Fixed Language Standard to designate the dominant language minority group(s) in the state.<sup>229</sup>

The appropriate standard may be different for various consumer transactions. For example, because Latinos/as may mistake their notary public for a lawyer and fall victim to inflated prices exploiting this potential confusion,<sup>230</sup> a legislature might require that notaries clarify that they are not lawyers in Spanish only. In contrast, when addressing abuses common to language minority groups such as merchants' failing to translate consumer contracts, universal, language-neutral reform may be necessary.

Finally, in considering whether the large Latino/a population demands special attention, such as through the Fixed Language Standard, reformers must confront the diversity of languages and dialects among Latinos/as. For example, Brazilians and some other Latinos/as speak Portuguese rather than Spanish, while in Mexico and Guatemala alone approximately 260 different indigenous

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227. See *Ramirez v. Plough, Inc.*, 863 P.2d 167, 176-77 (Cal. 1993) (refusing to require aspirin danger warnings in languages in which product is advertised because court believes legislature is appropriate forum to adopt this standard). *But see Torres v. Sachs*, 381 F. Supp. 309, 313 (S.D.N.Y. 1974) (ordering elections board to provide bilingual election officials at polls in election districts with 5% or more Puerto Rican population in order to assure this population's constitutional and statutory right to vote). This decision influenced the adoption of the federal Voting Rights Act standard. See *supra* note 201 (noting percentage thresholds requiring non-English voting materials).

228. See *supra* note 201 (discussing federal Voting Rights Act).

229. See *supra* note 202 (noting state statutes that require contract disclosure in Spanish).

230. See *supra* note 38 and accompanying text (discussing Florida law enacted to combat fraud on non-English speakers).

languages are spoken.<sup>231</sup> In Mexico, over five million people speak an indigenous language.<sup>232</sup> Moreover, diversity in dialects among Spanish-speakers raises concerns for reforms that require translations into the Spanish language. Differences in dialect, though in practice not too substantial,<sup>233</sup> may render translations at least partially inaccurate. Because speakers of the four primary varieties of Spanish spoken in America—Mexican, Puerto Rican, Cuban, and Peninsular<sup>234</sup>—tend to concentrate in different locations, merchants may be able to accommodate these differences.

*E. Inadequacies of the Market Perfection Paradigm as Applied to Language Minorities*

Consumer protection regulation usually employs either a market perfection or a market control design.<sup>235</sup> Market perfection solutions aim to improve the performance of market participants.<sup>236</sup> The classic example is disclosure legislation intended to correct the market's failure to provide information necessary to ensure competition.<sup>237</sup> The market perfection paradigm views markets as healthy institutions and consumers as competent to protect their own interests once given the necessary disclosures.<sup>238</sup> In contrast, market control

231. FERNANDO PEÑALOSA, CHICANO SOCIOLOGICAL LINGUISTICS 24 (1980) (citing 1959 study of indigenous influences on language diversity).

232. *Report on 1990 Census Results*, *supra* note 28. In Guatemala, 32% of the population speaks an indigenous language. Michael Ross Fowler & Julie M. Bunck, *Legal Imperialism or Disinterested Assistance? American Legal Aid in the Caribbean Basin*, 55 ALB. L. REV. 815, 833 n.97 (1992).

233. For example, a Mexican Spanish-speaker would refer to an orange as a "naranja," but a Puerto Rican Spanish-speaker would use "china." Substantial differences in word meanings are often confined to nouns. Another example is the slang "nieve" which means ice cream in Mexico, but means snow among Spanish-speakers in other regions. See Marty Westerman, *Death of the Frito Bandito*, AM. DEMOGRAPHICS, Mar. 1989, at 28, 32 (describing impact of this diversity in dialects on Borden ice cream advertising campaign). See generally ROSAURA SÁNCHEZ, CHICANO DISCOURSE: SOCIO-HISTORIC PERSPECTIVES 98-138 (1983).

234. PEÑALOSA, *supra* note 231, at 25.

235. See Robert D. Cooter & Edward L. Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987*, 35 UCLA L. REV. 1115, 1174 (1988) (referring to market control as "market displacing" and suggesting market stimulation as third model). One example of market stimulation is to take bank policies toward language minorities into account in approving the mergers of regulated lenders. Cf. Bender, *supra* note 46, at 809-10 (describing relevance of compliance with ECOA when national banks seek federal approval of acquisitions). In theory, market perfection regulation also stimulates the market to respond to the agenda of the informed consumer.

236. See Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 157 n.22 (1988) (referring to market perfection solutions as "those which perfect the ideal dialogue between sellers and buyers by helping buyers to negotiate more effectively or to comparison shop more easily").

237. Cooter & Rubin, *supra* note 235, at 1175 (acknowledging that disclosure was part of Expedited Funds Availability Act, designed to inform consumers when market fails to do so).

238. Cooter & Rubin, *supra* note 235, at 1178-79 (arguing that disclosure allows regulators to make efficient decisions and consumers to protect their own interests).

solutions assume that efficient operation of the market cannot be restored and must therefore be displaced by government control of the substantive terms of the bargain.<sup>239</sup>

Described as the "cornerstone of consumer credit legislation,"<sup>240</sup> the federal Truth in Lending Act (TILA)<sup>241</sup> employs both models of consumer regulation. Among its provisions, TILA requires that lenders disclose the annual percentage rate and other basic terms of the loan transaction.<sup>242</sup> In addition to market perfecting disclosure, TILA employs market controls, such as prohibiting creditor termination of home equity credit plans except in certain specified circumstances.<sup>243</sup> Employed by TILA for certain home loans, cooling-off periods share attributes of both the market control and market perfection models.<sup>244</sup> Market control strategies in TILA, however, usually target isolated loan transactions and are overshadowed by TILA's typical reliance on disclosures. TILA's declaration of purpose emphasizes this market perfection model:

The Congress finds that economic stabilization would be enhanced and the competition . . . would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various

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239. Cooter & Rubin, *supra* note 235, at 1174. For example, the FTC's Credit Practices Rule employs market control in outlawing various terms in consumer credit transactions such as confessions of judgment, wage assignments, and certain blanket security interests in household goods. 16 C.F.R. § 444.2 (1995).

240. James P. Nehf, *Effective Regulation of Rent-To-Own Contracts*, 52 OHIO ST. L.J. 751, 758 (1991).

241. 15 U.S.C. §§ 1601-1677 (1994).

242. *Id.* §§ 1632, 1637, 1637a, 1638.

243. *Id.* § 1647. The Truth in Lending Act (TILA) also employs what Professors Cooter and Rubin refer to as market stimulating strategies. See Cooter & Rubin, *supra* note 235, at 1174 ("A market stimulating statute is based on the premise that the market's operation can be restored, but only by imposing governmental rules. For such rules to restore, rather than displace, the market they must mimic some aspect of the market's operation that has been eliminated by the market failure."). For example, by excluding voluntary credit insurance premiums from its definition of the finance charge and therefore from the calculation of the annual percentage rate, TILA encourages lenders to offer optional rather than required credit insurance. See 15 U.S.C. § 1605(b).

244. See 15 U.S.C. § 1635 (allowing for right to rescind transaction during specified window of time). Cooling-off legislation reflects the market perfection model by allowing the consumer time to consider the bargain and to comparison shop. See Peter M. Juzwiak, *Mr. Micawber Revisited: A Critique of the Credit Practices Rule*, 64 S. CAL. L. REV. 417, 454 (1991) (describing cooling-off legislation and its benefit to market efficiency and consumers). This legislation also controls the substantive terms of the bargain by delaying the final bargain until the specified cooling-off period has passed. *Id.*

credit terms available . . . and avoid the uninformed use of credit  
 . . . .<sup>245</sup>

TILA's predilection toward the market perfection paradigm reflects the usual tendency of legislatures and of many commentators to reject market control solutions as antithetical to freedom of contract.<sup>246</sup> One commentator urges that legislatures resist market control solutions because such substantive regulation is easily eluded and limits consumer choices in a non-optimal manner.<sup>247</sup> Usury regulation is a familiar market control strategy that illustrates these concerns. In order to elude restrictions on the legal rate of interest, lenders often charge unregulated fees and costs that fall outside the statutory definition of interest.<sup>248</sup> Moreover, usury laws may exclude high risk borrowers from the legal lending market.<sup>249</sup>

Because of these free market concerns, many commentators promote market perfection by disclosure laws as the preferred legislative response to imperfect markets.<sup>250</sup> Other commentators, however, point to the many weaknesses of disclosure regulation, aiming their criticism at TILA's disclosure scheme.<sup>251</sup> Critics of TILA charge that disclosure of the true cost of credit has had little effect on consumers, particularly those with low incomes.<sup>252</sup> Among the evaluative disabilities consumers face in reading consumer

245. 15 U.S.C. § 1601(a). See generally Jonathan M. Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L.F. 669 (observing that TILA relies on consumer's own efforts to police marketplace).

246. See William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 470 (describing benefit of disclosure laws over regulation of substantive terms as "less complete interference with freedom of contract"); see also E. ALLAN FARNSWORTH, *CONTRACTS* § 4.29, at 519 (2d ed. 1990) (remarking that legislatures have favored disclosure rather than control of terms "as more consistent with a market economy").

247. See Schwartz & Wilde, *supra* note 152, at 667 (criticizing regulations for forcing consumers to accept harsh terms or higher price in place of them); see also Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 513 (1981) ("[I]nformation remedies allow consumers to protect themselves according to personal preferences rather than place on regulators the difficult task of compromising diverse preferences with a common standard.").

248. Bender, *supra* note 46, at 740 (discussing use of inflated cash prices to take advantage of unsuspecting consumers in order to compensate for restriction on interest rates).

249. Bender, *supra* note 46, at 728-32 (arguing that lowering rate ceiling merely increases number of borrowers "unable to qualify for credit at or below legal limit"); see also Nehf, *supra* note 240, at 781 n.133 ("To the extent that rate limits exclude high-risk individuals from obtaining credit, usury laws can actually hurt the poorer segments of the population.").

250. Beales et al., *supra* note 247, at 513; Schwartz & Wilde, *supra* note 152, at 668-71, 673; Whitford, *supra* note 246, at 470.

251. See Edward L. Rubin, *Legislative Methodology: Some Lessons From the Truth-in-Lending Act*, 80 GEO. L.J. 233, 239 (1991) (questioning effectiveness of Truth in Lending Simplification and Reform Act in informing consumers or encouraging effective credit shopping).

252. See Rubin, *supra* note 251, at 236 (stating that studies indicate that benefits from disclosure are "limited to the same upscale consumers who would manage perfectly well" absent legislation).



contracts and disclosures are a lack of education,<sup>253</sup> so-called information overload,<sup>254</sup> physical settings for consumer bargaining that are not conducive to careful deliberation and analysis,<sup>255</sup> and the lack of opportunity to read the disclosures or the contract before becoming psychologically committed to the bargain.<sup>256</sup>

Results of a national literacy study released in 1993 (1993 Study) further fuel criticism of disclosure regulation.<sup>257</sup> The study revealed that forty to forty-four million of America's 191 million adults achieved in the lowest of five levels of proficiency in interpreting prose, documentary, and quantitative information.<sup>258</sup> Another fifty million adults performed at the next second lowest literacy level.<sup>259</sup> Based on these findings, one commentator has remarked that faith in the value of disclosure laws "to 'level the playing field' . . . should be reexamined in light of . . . [the evidence] that almost half of all Americans over age sixteen lack basic reading and math skills."<sup>260</sup>

The legislative tendency to favor market perfecting disclosure laws must also be reexamined to address the needs of the growing number of Spanish-Only Consumers and other language minorities. There are indications that disclosure may be even less effective for language minorities than it has proven for consumers generally. First, illiteracy rates of language minorities in their native languages might be higher than for English-speakers.<sup>261</sup> The 1993 Study did not measure the

253. See Davis, *supra* note 166, at 1356 ("Recent studies have shown that consumers think disclosure statements are complicated, that they do not read the statements, and that they remain ignorant of much of their legal relationship with the creditor.") (citations omitted); Ndiva Kofele-Kale, *The Impact of Truth-in-Lending Disclosures on Consumer Market Behavior: A Critique of the Critics of Truth-in-Lending Law*, 9 OKLA. CITY U. L. REV. 117, 132 (1984) (noting studies that report consumer awareness of such disclosed terms as annual percentage rate correlates strongly to education and income).

254. See generally Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977) (discussing overwhelming effect of disclosure on consumers and suggesting simplification of process).

255. See Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 725 (1979) (describing usual physical setting as "extremely stressful" because salesperson is usually close to consumer, children or noise may distract the consumer, and there may be subtle urging of "need for speed").

256. See *id.* at 715 (stating that disclosures are usually made to consumers at point in time which they are not likely to comparison shop); Whitford, *supra* note 246, at 426 ("Even in the rare case in which a consumer actually reads the contract before signing, it must be remembered that he usually views himself as already morally committed.")

257. IRWIN S. KIRSCH ET AL., NATIONAL CTR. FOR EDUCATION STATISTICS, *ADULT LITERACY IN AMERICA* (1993).

258. *Id.* at xiv.

259. *Id.*

260. Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1300 (1994).

261. See *supra* notes 23-30 and accompanying text (discussing literacy rates of Latino/a population).

literacy of Americans in languages other than English.<sup>262</sup> Because they use different methodologies than the 1993 Study, literacy studies in Mexico and in other countries do not provide an accurate comparison to the literacy of Americans in English.<sup>263</sup>

Counterpart statistics on the level of educational attainment, however, may provide a means of comparing literacy levels. Of the variables explored in the 1993 Study, the level of education had a stronger relationship to the level of literacy proficiency than any other single variable—including age and sex.<sup>264</sup> Reports that on average Mexicans spend as few as four years in formal education in Mexico<sup>265</sup> portend that the degree of literacy in Spanish of immigrants from Mexico may be much less than that in English for Americans generally.<sup>266</sup> Before enacting laws requiring written translations for Spanish-Only Consumers and other language minorities, more study is needed of their levels of literacy in their native languages.<sup>267</sup>

Another factor that may affect disclosure solutions is the cultural familiarity of language minorities with the information to be translated. Disclosure laws assume that consumers will read the information disclosed, understand its meaning, and then comparison shop for the best package of terms.<sup>268</sup> Reformers would profit from careful study of the level of language minorities' understanding of concepts such as balloon payments, credit insurance, as-is warranties, security interests, and others. Findings that language minorities are unfamiliar with concepts American businesses employ in consumer transactions may require market control solutions, more detailed disclosure than straight translations, and the establishment of consumer education programs to complement disclosure.<sup>269</sup>

Finally, the English language movement may restrict or impede the enactment of non-English disclosure regulation. For example, a statute that demands disclosure of essential terms in a language other than English may contravene a state constitution that prohibits the

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262. KIRSCH ET AL., *supra* note 257, at 13.

263. See *supra* notes 26-28 and accompanying text (noting disparity of results for studies of literacy rates among Spanish-speaking people).

264. KIRSCH ET AL., *supra* note 257, at 25.

265. See *supra* note 29 and accompanying text (discussing length of formal education in Mexico).

266. Cf. KIRSCH ET AL., *supra* note 257, at 35 (detailing 1992 statistics that state average years of schooling of white adults in America as 12.8).

267. The need for such a study of a particular language minority is especially acute when the legislature is inclined to adopt a Fixed Language Standard to protect that group.

268. Dwight Golann, *Beyond Truth in Lending: The Duty of Affirmative Disclosure*, 46 BUS. LAW. 1307, 1312 (1991).

269. See *infra* Part III.F.1 (discussing need for consumer education programs for language minorities).

legislature from enacting any law that requires the use of non-English languages.<sup>270</sup> In contrast, market control legislation that ensures a fair bargain without reference to language issues will evade any state (or national) English language law and, perhaps, the political climate that drives the English language movement. Moreover, because it is language neutral, market control legislation avoids the dilemma created under disclosure laws of deciding whether some or all language minority groups deserve protection.<sup>271</sup>

Despite these language minority-specific considerations that raise doubts about disclosure solutions, there are indications that disclosure may prove more effective for language minorities than for consumers generally. Legislatures should weigh both sets of indications carefully. First, language minorities might be more inclined than consumers generally to read disclosures or contracts in their native language. Studies might reveal that translations offer a source of cultural grounding when presented in an otherwise unfamiliar marketplace setting.<sup>272</sup>

Second, although consumers may only give their contract a quick reading to confirm that it is, in fact, the "right" contract,<sup>273</sup> a translation may enable language minorities, who cannot compare English contracts to the oral bargain they have struck, to perform this important task.<sup>274</sup> For example, a Spanish-Only Consumer who intends to purchase but, through fraud or mistake, leases an automobile, is protected by a translation law if she at least reads the translated document's caption. This example also exposes an important constraint on market control regulation in addressing problems of language minorities. Because it would infringe too severely on consumer choice, few consumer advocates would urge that

270. See *supra* Part II.A (discussing impact of English language movement on consumer protection regulation).

271. See *supra* Part II.D (discussing various language-neutral and language-specific standards for extending protection to language minority consumers).

272. Another potential area for study is whether Spanish-Only Consumers who are illiterate in Spanish nonetheless can readily find someone literate in Spanish to accompany them in their significant consumer transactions. It is possible that language minorities can find such literate Spanish-speaking persons more easily than a bilingual person able to orally translate an English writing into Spanish.

273. See Landers & Rohner, *supra* note 255, at 722 (stating that atmosphere in which contracts are generally read prevents consumers from paying attention to particulars, and at best, consumers might quickly confirm that they are signing the type of contract they intended).

274. To aid this function, translation laws should adopt Florida's requirement that the translation also disclose in the same non-English language: "READ THIS FIRST. This is a translation of the document that you are about to sign." FLA. ADMIN. CODE ANN. r. 2-9.005 (1992).

legislatures outlaw consumer leasing transactions.<sup>275</sup> Here, translation laws present an attractive alternative.

In general, the choice between market control and market perfection should turn on a balancing test. The extent of the inability to correct the particular market failure through disclosure should be weighed against the degree of infringement that market control places on the consumer's freedom of contractual choice. Therefore, the appropriate choice may vary for different consumer transactions. For example, studies of the credit insurance industry that report high saturation<sup>276</sup> and unfair pricing demonstrate that disclosure laws do little to encourage competition and fair pricing in that industry.<sup>277</sup> Here, price control may be necessary to protect not only language minorities but consumers generally. In contrast, the appropriate protection for language minorities who misinterpret lease bargains as sales is to require translated disclosure of the contract rather than to outlaw often beneficial consumer leases.

### III. AN AGENDA FOR REFORM: CONSUMER PROTECTION FOR LANGUAGE MINORITIES

#### A. *Agenda for Legislative Reform*

##### I. *Overview*

In addressing the marketplace abuse of language minorities, any legislature or advocate of legislative reform must confront and resolve the issues that this Article has examined: (1) whether an English language law or the movement that encourages these laws impedes legislative action;<sup>278</sup> (2) whether legislation is the appropriate vehicle to establish protection of language minorities;<sup>279</sup> (3) whether reform should extend to all languages other than English;<sup>280</sup> (4) whether reform should level the language playing field or address broader issues of racial discrimination in consumer transactions;<sup>281</sup>

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275. Price control would also fall short of addressing those language minorities who might unknowingly agree to an unintended lease bargain. So long as they make some profit, merchants would still have an incentive to defraud language minorities into a lease bargain through the lure of low monthly payments in relation to a purchase.

276. See Landers & Rohner, *supra* note 255, at 727 (reporting penetration rates of over 90%).

277. See Landers & Rohner, *supra* note 255, at 727-28 (asserting that Truth in Lending requirements for term disclosures fail to achieve intended purpose of lowering cost to consumers).

278. See *supra* Part II.A.

279. See *supra* Part II.B.

280. See *supra* Part II.D.

281. See *supra* Part II.C.

and (5) whether reform should employ a market perfection or market control model.<sup>282</sup> In summary, this Article argues that legislatures are the best vehicle to establish consumer protection for language minorities and that reform efforts initially should target language issues rather than discrimination generally. If Congress establishes language policy, it can overcome state English language laws. In the state legislatures and agencies, however, the impact of these laws must be determined on a state-by-state basis. Although it offers guidelines, this Article does not answer definitively whether to choose market control over market perfection, and whether reform should extend to all language minorities. The answers depend on factors such as the particular consumer transaction for which protection is sought, as well as the outcome of the additional studies proposed. In resolving these and other open issues, legislatures should follow Professor Edward Rubin's suggestion that instead of a precise bill, the proper starting point to enact effective consumer legislation is an issue for development in hearings.<sup>283</sup>

## 2. *Designing effective disclosure legislation for language minorities*

Because market control legislation is usually reserved for particularly abusive transactions and terms,<sup>284</sup> comprehensive legislative reform to protect language minorities will likely rely on market perfection strategies, particularly disclosure through translation. In structuring effective disclosure solutions for language minorities, legislatures must consider, among other issues, (1) the scope of transactions covered, (2) whether disclosure requirements should be language neutral, (3) how to ensure accurate translation, and (4) the adequacy of sanctions for noncompliance.

The range of consumer transactions includes loans, home and personal property rentals and purchases, the purchase of insurance, and the purchase of services, such as home improvements, car repairs, and even legal services. Most existing translation laws, however, are directed at isolated transactions such as door-to-door sales.<sup>285</sup> Even California's comprehensive translation law, which governs a wide range of transactions such as retail installment sales, leases of dwellings for over one month, vehicle leases, and fee agreements for legal services, excludes sales of homes and many home loan transac-

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282. See *supra* Part II.E.

283. Rubin, *supra* note 251, at 285-86.

284. See, e.g., 16 C.F.R. § 444.2 (1995) (outlawing confessions of judgment, waivers of exemptions, and certain other clauses in consumer credit contracts).

285. See *supra* Part I.C.4 (discussing limited legislative requirements for translations).

tions.<sup>286</sup> It also excludes certain documents incidental to covered transactions, such as rules and regulations under residential leases.<sup>287</sup> Shortly after its enactment, California's statute drew criticism for its failure to cover all transactions important to Spanish-Only Consumers.<sup>288</sup> In enacting a translation statute, a legislature should include all consumer transactions unless: (1) a market control solution for a particular transaction eliminates the need for disclosures;<sup>289</sup> (2) a particular transaction is shown to have no record of abuse of language minorities, whether because of merchant self-regulation or otherwise; or (3) the legislature determines that the cost of translation would exceed its benefit in a particular transaction. For example, Florida translation law excludes both cash sales receipts and any documents in sale transactions under \$150.<sup>290</sup>

Some existing translation statutes exclude transactions in which the language minority provides her own interpreter. For example, Oregon's rent-to-own translation law excludes transactions conducted through an interpreter "supplied" by the lessee.<sup>291</sup> Similarly, California's translation statute is inapplicable when the consumer has an interpreter not employed by or made available through the other party.<sup>292</sup> To protect against self-interested translations, these statutes should not defer to any interpreter who stands to benefit financially from the transaction, such as when a bilingual home improvement contractor acts as an intermediary between the consumer and a

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286. See CAL. CIV. CODE § 1632 (West Supp. 1995).

287. *Id.* § 1632(d). *But cf.* 5000 Park Assoc. v. Collado, 602 A.2d 803, 805 (N.J. Super. Ct. Law Div. 1991) (establishing common law right to receive apartment rules and regulations in Spanish, based on large local Latino/a population).

288. See Rodolpho Sandoval, *A Critical Analysis of the Cooling-Off Period for Door to Door Sales*, 3 CHICANO L. REV. 110, 146 (1976) (criticizing California statute because it "fails to cover areas of importance to non-English speaking consumers").

289. Often, the need for disclosure regulation may survive the adoption of market control measures. For example, usury laws might provide an outside limit on interest rates, but consumers who deserve a rate lower than the rate ceiling would benefit from rate disclosures.

290. FLA. ADMIN. CODE ANN. r. 2-9.005 (1992). Another cost-benefit determination will involve whether to require translation of just those disclosures mandated by other law or of the written contract too. In loan transactions, for example, should translation extend beyond the TILA disclosure to encompass the promissory note and any security documents? Must the lender translate any subsequent foreclosure notice too? Because individualized foreclosure notices might be expensive to translate, the legislature might require a standardized warning of the need for translation. See UNIFORM LAND SECURITY INTEREST ACT § 112(f) (1985) (requiring foreclosure and other notices to contain statement in languages designated by state enforcement agency that "[t]his is an important notice regarding your rights in real estate. Get it translated immediately"); *cf.* Reyes v. Household Fin. Corp., 173 Cal. Rptr. 267, 267-68 (Ct. App. 1981) (construing California's translation statute to extend to notice of repossession and deficiency under automobile loan).

291. OR. REV. STAT. § 646.249 (1993).

292. CAL. CIV. CODE § 1632(e) (West Supp. 1995).

lender that finances the contractor's improvements.<sup>293</sup> Even so limited, this interpreter exception seems ill-advised. The court must determine whether the consumer's interpreter was in fact competent to interpret the bargain.<sup>294</sup> Moreover, those bargain terms that the interpreter deems important enough to translate may not coincide with those terms important to the consumer.<sup>295</sup> Finally, if the transaction calls for a standard contract or disclosure that the merchant has translated in advance for language minorities without interpreters, it would be little trouble to provide that translation to consumers with interpreters.<sup>296</sup>

In requiring translations, the legislature must select a standard to determine when and in what languages the requirement is triggered. This selection will depend on factors such as whether the legislation is adopted by Congress or a state legislature, whether the legislature desires a language neutral standard, and the particular transaction for which translation is required. Recommendations and guidance to the legislature for resolving these issues may be found elsewhere in this Article.<sup>297</sup>

Another issue the legislature should address is how to ensure accurate translations. Concern over the accuracy of translations led the FTC to limit its used car rule translation requirement to just those sales conducted in Spanish.<sup>298</sup> The FTC assured an accurate translation by specifying in Spanish the exact language of the required

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293. See *Teran v. Citicorp Person-to-Person Fin. Ctr.*, 706 P.2d 382, 384-87 (Ariz. Ct. App. 1985) (refusing to hold lender accountable for fraudulent interpretation of loan bargain given by employee of home improvement contractor to Spanish-Only Consumers where lender did not attempt interpretation or furnish interpreter); see also *In re Hyun-Bok Chung*, 43 B.R. 368, 369 (1984) (finding minority boutique owners bound by security agreement written in English because their English-speaking daughter present at signing should have interpreted agreement for them).

294. See CAL. CIV. CODE § 1632(e) (West Supp. 1995) (defining interpreter in relevant part to mean "a person, not a minor, able to speak fluently and read with full understanding the English and Spanish languages").

295. Cf. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1191 (1993) (noting translator's practice consists of power to change text); Grace Leonard, *Patents and Translation*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 561, 563 (1994) (noting importance of continuity in work with translator so that translator may become familiar with client's business requirements and style).

296. A reasonable exception to any translation statute would exclude persons not engaged in a trade or business. The judicial doctrines of fraud and unconscionability would still apply to overreaching by individuals in isolated transactions (e.g., sales of cars). See *supra* Part I.C (discussing fraud and unconscionability).

297. See *supra* Part II.B (advocating legislation as appropriate protection for language minorities against market's failure to translate their bargains and discussing appropriate legislative bodies to address issue); Part II.D (articulating various language-neutral and language-specific standards).

298. 49 Fed. Reg. 45,692, 45,711 (1984).

disclosure.<sup>299</sup> When the material to be translated is not standardized, other approaches might ensure accuracy. For example, under California's general translation law the state Department of Consumer Affairs will verify translation accuracy for a fee.<sup>300</sup>

Finally, a legislature that requires translations must determine a sufficient sanction for noncompliance. California's translation law authorizes consumers to rescind untranslated contracts.<sup>301</sup> Ordinarily, the availability of rescission may avoid the need for courts to determine the extent of any unfairness in fixing an actual damages remedy. Limiting relief to rescission, however, may be inadequate in some circumstances. For example, a consumer who rescinds an untranslated loan bargain used to finance a vacation presumably would need to borrow the money at the market rate to repay the loan proceeds. If the original loan rate is equal to or below that market rate,<sup>302</sup> then the consumer gains nothing by exercising rescission and incurs the transaction costs of obtaining a substitute loan. Therefore, legislatures should consider authorizing minimum damages or a doubling or trebling of actual damages to help deter noncompliance.<sup>303</sup>

Legislatures that require translations should also consider ways to overcome the inadequacies of disclosure laws.<sup>304</sup> Employed in door-to-door transactions,<sup>305</sup> home equity loans,<sup>306</sup> and certain other transactions, "cooling-off" laws might be extended to additional transactions, thus giving language minorities sufficient opportunity to

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299. 16 C.F.R. § 455.5 (1995). Claims by drug manufacturers of the difficulty in obtaining accurate translations of drug package insert warnings led the Food and Drug Administration to prepare a Spanish language insert for the industry. 46 Fed. Reg. 160, 163 (1981). The FDA ultimately abandoned its package insert requirements. See 47 Fed. Reg. 39,147-55 (1982) (revoking 46 Fed. Reg. 160).

300. CAL. CIV. CODE § 1632(h) (West Supp. 1995). Presumably, to negate the inference that the government passed on the substantive fairness of the contract, the statute prohibits the merchant from advertising or representing that the government has verified the translation. *Id.* § 1632(j).

301. *Id.* § 1632(g).

302. This would likely be the case for victims of an Unintended Bargain where the interest rate, although more than the consumer would have incurred knowingly, is a fair rate given the consumer's credit standing.

303. See Bender, *supra* note 94, at 667-71 (discussing need for additional damage formulas under state unfair trade practice acts).

304. See *supra* Part II.E (discussing benefits and drawbacks of market perfection paradigm and use of disclosure laws to correct market's failure to provide necessary information to consumers).

305. *E.g.*, 16 C.F.R. § 429.1(b) (1995). Typically, a "door-to-door" sale refers to a transaction in which the seller personally solicits the sale at a place other than the seller's place of business. *Id.* note 1(a).

306. See 15 U.S.C. § 1635 (1994) (establishing right to rescind for buyer before midnight of third business day after parties have entered into certain credit transactions involving buyer's principal dwelling as security interest).



examine the terms of the translated bargain and generally aiding comparison shopping for consumers.<sup>307</sup> To overcome consumer illiteracy, legislatures might require oral translations of important terms in addition to written disclosures.<sup>308</sup> Merchants not fluent in the particular language could provide the oral disclosure on a voice recording cassette prepared by some translation intermediary.<sup>309</sup> To simplify the content of written translations, the legislature might look to the "plain English" laws in effect in several states.<sup>310</sup> Making contracts easier to read in English should also make them easier to translate into other languages. Finally, funding consumer education

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307. See generally Byron D. Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 UCLA L. REV. 717 (1968) (discussing pros and cons of "cooling-off" period legislation and problems associated with drafting such legislation). Whether the benefits of cooling-off periods outweigh their delay of the bargain, however, has been called into question by evidence that consumers rarely exercise their cancellation rights. See John E. Bryson & Stephen S. Dunham, Note, *A Case Study on the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 628-30 (1969) (discussing impact of Connecticut's "cooling-off" statute as limited because provision allowing rescission by midnight of day of sale is too short). Dean Kronman once remarked that legislatures rarely employ a cooling-off period because of its "antidemocratic" affect on the parties' freedom of contract and, therefore, that lawmakers "would never think of imposing a cooling-off period in every contractual relationship." Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 795 (1983).

308. See Whitford, *supra* note 246, at 448-49 (suggesting that oral disclosure during precontract negotiations may be particularly effective to convey information to consumers with substandard reading abilities, but notes various drawbacks of oral disclosures such as merchant's ability to lessen their impact by tone of voice). Some federal and state statutes require oral disclosures with or instead of written disclosures. See, e.g., 16 C.F.R. § 429.1(e) (1995) (requiring both written and oral notice of consumer's right to cancel transaction to comply with FTC door-to-door rule); CAL. BUS. & PROF. CODE § 22502.1 (1995) (requiring ticket seller to inform purchaser of disclosures in writing and orally); S.D. CODIFIED LAWS ANN. § 58-33-73 (1995) (requiring insurance company to make oral and written disclosure to insured regarding automobile glass replacement or repair services); UTAH CODE ANN. § 57-23-6 (1994) (establishing that seller of real estate cooperative interest must make prescribed disclosures to purchaser both orally and in writing).

For dangerous product warnings, symbols might effectively convey information to consumers regardless of their language and literacy in that language. See *Campos v. Firestone Tire & Rubber Co.*, 485 A.2d 305, 310 (N.J. 1984) (holding that symbols may be more appropriate than written warnings when many product users are illiterate). In other consumer settings, however, pictorial warnings appear to be of little practical value. For example, how would one illustrate a high interest rate loan?

309. Professor Nehf has expressed reservations about oral disclosures in consumer transactions because businesses might not easily refute false claims that they failed to provide the required oral disclosure. See Nehf, *supra* note 240, at 844 n.361 (explaining difficulty in enforcing oral disclosure requirements and offering alternative solutions). Retention in the lender's file of a copy of the tape (or a written transcript of the disclosure), however, would serve as the equivalent of a copy of a written disclosure form. Moreover, testimony of a practice of oral disclosure might overcome such claims. See *Tashof v. FTC*, 437 F.2d 707, 714-15 (D.C. Cir. 1970) (upholding FTC order requiring merchant guilty of deceptive practices to disclose its credit terms both orally and in writing despite merchant's fear of false claims).

310. See generally Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 106 (1995) (citing 10 states with this legislation—Connecticut, Hawaii, Maine, Minnesota, Montana, New Jersey, New York, Oregon, Pennsylvania, and West Virginia).

programs can help to overcome evaluative disabilities that the translation laws cannot address.<sup>311</sup>

Because legislative attention to the needs of language minorities may not be forthcoming,<sup>312</sup> or may leave gaps in coverage, reformers must look to other means to establish protection. One strategy that holds promise is to seek the judicial and administrative interpretation and expansion of existing civil rights laws, consumer protection laws, and common law doctrines to encompass abuses of language minorities.<sup>313</sup> The next sections of this Article examine the potential reach of these existing laws into the new realm of language minority consumer protection.

## B. *Employing Civil Rights Laws Against Language Fraud and the English-Only Marketplace*

### 1. *The Civil Rights Acts*

The federal Civil Rights Acts, §§ 1981 and 1982, give all persons the same right to make and enforce contracts,<sup>314</sup> and all citizens the same right to purchase and sell real and personal property.<sup>315</sup> These requirements extend beyond state action to encompass private discrimination,<sup>316</sup> including discrimination in consumer transac-

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311. See *infra* Part III.F.1 (discussing consumer education programs as possible solution to some of language minority problems if programs are adequately funded and specifically targeted to meet needs of language minorities).

312. See *supra* note 182 and accompanying text (discussing how current political climate may not support legislation favorable to language minorities, but how courts may adopt broad antidiscrimination principle).

313. See *infra* Part III.B-F (discussing alternative approaches to reform aside from legislative initiatives, including using civil rights laws, unfair trade practice laws, doctrine of fraud, doctrine of unconscionability, or other institutional strategies).

314. 42 U.S.C. § 1981 (1994).

315. *Id.* § 1982. For a discussion of the statutory precursors to §§ 1981 and 1982, see Mary J. Woodhead, Comment, *Ethnic Origin Discrimination as Race Discrimination Under Section 1981 and Section 1982*, 1989 UTAH L. REV. 741, 742-43. Courts typically construe §§ 1981 and 1982 the same on such general issues as the need for intentional discrimination and the recoverable damages. Under their plain terms, however, § 1981 protects noncitizens as "persons," but § 1982 protects only "citizens." Compare 42 U.S.C. § 1981(a) (using language "[a]ll persons") with *id.* § 1982 (using language "[a]ll citizens").

316. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973) (noting historical interrelationship between §§ 1981 and 1982); *Jones v. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that § 1982 bars public and private discrimination in sale or rental of property). As part of the Civil Rights Act of 1991, Congress added an express reference in § 1981 to nongovernmental discrimination. Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)).

tions.<sup>317</sup> Successful claimants may recover compensatory and punitive damages.<sup>318</sup>

Two significant obstacles that could impede the use of §§ 1981 and 1982 by the Spanish-Only Consumer and other language minorities injured by language fraud or other English-Only practices in the marketplace are the requirements that the claimant: (1) prove racial discrimination,<sup>319</sup> and (2) prove that the discrimination was purposeful.<sup>320</sup> Until a 1987 Supreme Court decision involving an Arabian professor denied tenure,<sup>321</sup> it was uncertain whether §§ 1981 and 1982 protected Latinos/as.<sup>322</sup> In an effort to understand race, the Supreme Court explored Congress' intent behind the predecessors to §§ 1981 and 1982.<sup>323</sup> The Court concluded that Congress "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."<sup>324</sup> Among those

317. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 334 (7th Cir.) (allowing claim under § 1982 alleging discriminatory housing market), *cert. denied*, 419 U.S. 1070 (1974). In the Civil Rights Act of 1991, Congress overrode the Supreme Court's refusal to extend § 1981 to post-contract formation discrimination. See Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)) (defining "make and enforce contracts" to include the performance of contracts, thereby overruling *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80 (1989) (holding that racial harassment occurring in course of employment is not actionable under § 1981)).

318. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (noting that § 1981 entitles successful claimants to equitable and legal relief and, under certain circumstances, compensatory and punitive damages). Despite the prospect of similar remedies in a successful action for deceit, discussed *infra* Part III.D, an action under the Civil Rights Acts would enable the plaintiff to sue in federal court and to avoid certain elements of proof required in fraud actions, such as the reasonableness of reliance on the false representation.

319. 42 U.S.C. § 1981 ("All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."); *id.* § 1982 ("All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.").

320. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390 (1982) (finding that discriminatory purpose is required for § 1981 claim); see also *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 687-89 (5th Cir. 1981) (holding that successful § 1981 claimant must show discriminatory intent).

321. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609-13 (1987).

322. The lower courts had failed to reach a consensus. Compare *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 612-13 (M.D. Pa. 1978) (dismissing plaintiffs' § 1981 claim against employer alleging discrimination based on their Puerto Rican background) with *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 559-68 (E.D. Cal. 1982) (allowing claim by Puerto Rican plaintiff and refusing to follow those courts that rejected national origin claims under § 1981, instead adopting a "dynamic" definition of racial discrimination without identifying bright line between racial and national origin discrimination). See generally Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975) (arguing that Mexican Americans are protected under §§ 1981 and 1982 as nonwhite racial group).

323. *Saint Francis*, 481 U.S. at 609-13.

324. *Id.* at 613; see also *Shaare Telfil Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (applying court's holding in *Saint Francis* in finding that "Jews and Arabs were among the peoples then considered to be distinct races and hence within protection of [§ 1982]").

groups referred to as a race in debates that preceded the enactment of §§ 1981 and 1982 were Mexicans and Spaniards.<sup>325</sup> Since the Supreme Court's decision, district courts have refused to grant summary judgment against § 1981 claims brought by Cuban<sup>326</sup> and Puerto Rican plaintiffs.<sup>327</sup>

Although it now appears that all or most Latinos/as constitute a nonwhite race (or races) for purposes of §§ 1981 and 1982, it is not clear whether exploiting a language barrier is racial discrimination. In 1973, one of the few cases to consider the application of §§ 1981 and 1982 to language-based discrimination held that a tavern's English-Only policy constituted "patent racial discrimination" against its Mexican customers.<sup>328</sup> The tavern's language rule deprived Spanish-speaking persons of their right to contract for the purchase of beer and the right to drink it at the bar on an equal footing with white, English-speaking, customers.<sup>329</sup>

Although it arose in a consumer setting, this decision has dubious persuasive value for language minority consumers because it established a negative right in outlawing the tavern's ban on the speaking of Spanish. This is distinguishable from the positive right to obtain a Spanish-language translation from a business. Moreover, citing *Griggs v. Duke Power Co.*,<sup>330</sup> the court looked to the language rule's impact on Mexican customers, not to the tavern owner's intent, in deciding that the policy violated §§ 1981 and 1982.<sup>331</sup> Later, however, the Supreme Court refused to apply the *Griggs* disparate impact standard of proof in § 1981 litigation.<sup>332</sup> Instead, it held that § 1981, like the Equal Protection Clause, "can be violated only by purposeful discrimination."<sup>333</sup> Subsequently, the proof requirement

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325. *Saint Francis*, 481 U.S. at 612. See generally Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 604-07 (1995) (postulating that broad 19th century conception of "race" adopted for §§ 1981 and 1982 claims could be more inclusive than treatment of ethnicity-based claims under Equal Protection Clause).

326. See *Quintana v. Byrd*, 669 F. Supp. 849, 850 (N.D. Ill. 1987) (refusing to dismiss § 1981 claim brought by Cuban who alleged discrimination based on Hispanic ethnic characteristics).

327. See *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 720-21 (D.P.R. 1992) (holding that regardless of color or appearance, plaintiff may bring § 1981 claim as Puerto Rican who, identified as such, was discriminated against because of his race).

328. See *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 755 (D. Or. 1973) ("There is no question but that 42 U.S.C. §§ 1981 and 1982 have been interpreted to ban the discrimination alleged [here].").

329. *Id.*

330. 401 U.S. 424 (1971).

331. *Hernandez*, 368 F. Supp. at 755 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

332. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) (holding that successful § 1981 claim must demonstrate intentional discrimination).

333. *Id.*

frustrated an analogous § 1981 language claim brought against an employer that refused to hire truck drivers who spoke only Spanish.<sup>334</sup>

Whether the need for purposeful racial discrimination will hamper the claims of language minority consumers under §§ 1981 and 1982 probably depends on the nature of their claim. The victim of the Fraud Bargain<sup>335</sup> has the best chance to state a claim. In his much acclaimed study concluding that blacks pay more than white men in retail car transactions, Professor Ayres explained that to establish intentional discrimination under §§ 1981 and 1982 the black car purchaser "would need to show that the specific car dealer with whom he or she had bargained considered the plaintiff's race in deciding how to bargain."<sup>336</sup> Therefore, the Fraud Bargain victim must establish that the business took her race into account in deciding to misrepresent to her the terms of the written bargain.

Among its rejoinders, the business might argue: (1) its motive was to make money, not to discriminate against the consumer; (2) discrimination claims contemplate the refusal to deal with a certain race, not bargains struck on disparate terms; and (3) exploiting the consumer's language barrier is not discrimination based on race. Courts should reject them all. As to the first rejoinder, Professor Ayres reached the analogous conclusion that car dealers cannot attribute the higher prices obtained from black purchasers to a nondiscriminatory motive of maximizing profit because "[d]iscrimination may be instrumental to a goal not itself discriminatory [such as profit]."<sup>337</sup> As to the second rejoinder, courts have established that §§ 1981 and 1982 extend beyond the refusal to deal with a certain race to guard against bargains struck on discriminatory terms. For example, one court concluded that "there is no reason to distinguish a refusal to sell on the ground of race and a sale on

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334. See *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686, 688 (5th Cir. 1981) (citing precedent illustrating that § 1981 standard may be equated with purposeful discrimination standards of Fifth and Fourteenth Amendments), *cert. denied*, 458 U.S. 1122 (1982). Because claimants under the Equal Employment Opportunity Act need only prove disparate impact, employer language policies are best challenged under that Act. See generally BILL PIATT, LANGUAGE ON THE JOB 49 (1993). In *Vasquez*, the lower court dismissed the employee's claim under the Act because he failed to satisfy its jurisdictional prerequisites. *Vasquez*, 660 F.2d at 687.

335. See *supra* Part I.C.1 (providing example of Fraud Bargain as when non-English speaking consumer signs promissory note in English and merchant/lender orally represents rate of interest lower than rate in promissory note).

336. Ayres, *supra* note 184, at 859.

337. Ayres, *supra* note 184, at 862 (quoting *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990)).

discriminatory prices and terms.”<sup>338</sup> Finally, exploiting a consumer’s language barrier should constitute racial discrimination because the native language of a nonwhite consumer is one of her “ancestry and ethnic characteristics.”<sup>339</sup> Thus, the language minority should state a claim when targeted for a fraudulent bargain that exploits her language barrier.

Consumer victims of an Unfair Bargain are less likely to state claims under §§ 1981 and 1982 than victims of fraud. In this bargain model, language minorities have agreed to unfair terms but without any affirmative misrepresentations. Here, in addition to its arguments against the Fraud Bargain victim, the merchant might add that it did not target the consumer for any unfair treatment. Instead, the business may claim its practice to offer substantively unfair terms is racially neutral because it entraps “suckers” of any race who fail to read the contract or comparison shop. For the Unfair Bargain victim to prevail under §§ 1981 and 1982, the factfinder would have to reach the unlikely conclusion that the business included the unfair term in its English language contract to discriminate against nonwhites.<sup>340</sup>

Finally, language minority victims of an Unintended Bargain probably have no claim under §§ 1981 and 1982. Although subjectively undesirable, these bargains are objectively fair and have not been misrepresented. In these circumstances, the business will claim that it did not engage in any purposeful discrimination,<sup>341</sup> and, at least when the merchant believed that the bargain was acceptable to the consumer, the court will probably side with the merchant.

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338. *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969), *aff'd sub nom. Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); see also JONATHAN SHELDON, CREDIT DISCRIMINATION § 4.2.10.3, at 85-86 (1993 & Supp. 1995) (explaining that practice of targeting minority groups for predatory loans (known as “reverse redlining”) is actionable discrimination under §§ 1981 and 1982, and other laws, even though “[o]n first blush it may appear contradictory to find a creditor to discriminate by offering minorities credit”).

339. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (concluding that Congress intended to protect persons discriminated against “solely because of their ancestry or ethnic characteristics”); see Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 832-34 (1994) (defining ethnicity as consisting of one’s ethnic traits such as language).

340. The purveyor of a Fraud Bargain might argue similarly that it was seeking “suckers” who would not compare the written contract to the oral misrepresentations. It seems unlikely, however, that merchants will misrepresent the written bargain to all their customers. In contrast, it is likely that a business will offer unfair terms to all its customers, looking for “sucker” sales to victims white and nonwhite. Professor Ayres pioneered the concept of sucker pricing in describing an auto dealer’s business as a “search for suckers”—referring in that context to a search for customers willing to pay high markups for whatever reason. Ayres, *supra* note 184, at 854.

341. Cf. Note, *supra* note 147, at 1358 (explaining that government distribution of materials in English only is not purposeful discrimination under Equal Protection Clause because “there is no design to disadvantage those who do not understand the language”).

## 2. *The Equal Credit Opportunity Act*

Compared to their actions under §§ 1981 and 1982, language minority claimants who invoke the federal Equal Credit Opportunity Act (ECOA)<sup>342</sup> face two obstacles but gain an important advantage. Although the ECOA governs only credit transactions and its application to language-based claims against lenders is uncertain, it does not require proof of intentional discrimination.

In contrast to the Supreme Court's liberal interpretation of §§ 1981 and 1982 to prohibit ethnicity-based discrimination,<sup>343</sup> courts have not yet construed the ECOA's prohibition of "race," "color," or "national origin" discrimination<sup>344</sup> to encompass ethnic characteristics such as language. In pursuing language-based claims, ECOA claimants may reference several commentators who urge that an individual's primary language is "closely correlated and inextricably linked with their national origin."<sup>345</sup> Claimants may also refer to Equal Employment Opportunity Commission Guidelines that create a presumption that employer English-Only rules constitute national origin discrimination under Title VII because "[t]he primary language of an individual is often an essential [characteristic of] national origin."<sup>346</sup>

342. 15 U.S.C. §§ 1691-1691f (1994); SHELDON, *supra* note 338, § 2.2.2, at 41. ECOA remedies are somewhat less forceful than those under §§ 1981 and 1982 because of the statutory limit on punitive damages. See 15 U.S.C. § 1691e (limiting punitive damages in individual ECOA actions to amount not greater than \$10,000); Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975) (noting that under certain circumstances punitive damages may be awarded in §§ 1981 or 1982 claim).

343. Shaare Telfila Congregation v. Cobb, 481 U.S. 615, 615 (1987); *Saint Francis*, 481 U.S. at 604.

344. 15 U.S.C. § 1691(a)(1) (1994).

345. Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 276 (1990); see also Yniguez v. Arizonans for Official English, 69 F.3d 920, 947-48 (9th Cir. 1995) (en banc) ("Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment.") (citations omitted); Califa, *supra* note 130, at 332-34 (discussing strict scrutiny and language-based classifications); Manuel del Valle, *Language Rights and Due Process-Hispanics in the United States*, 17 REV. J. U. INT'L P.R. 91 (1982) (discussing language-based discrimination); Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1, 28-32 (1991) (arguing that English-Only provisions are unconstitutional); Perea, *supra* note 109, at 357-60 (urging that courts recognize language discrimination as proxy for national origin discrimination); Rey M. Rodriguez, *The Misguided Application of English-Only Rules in the Workplace*, 14 CHICANO-LATINO L. REV. 67, 73-75 (1994) (asserting that language is proxy for national origin).

346. 29 C.F.R. § 1606.7(a) (1995). An Office of Thrift Supervision rule articulates the same nexus between language and national origin. See 12 C.F.R. § 571.24(c)(2) ("Requiring fluency in the English language as a prerequisite for obtaining a loan may be a discriminatory practice based on national origin.").

Lenders, however, might cite cases that refuse to apply the strict scrutiny standard of review reserved for race and national origin classifications when claimants level equal protection challenges against government language policies. In *Soberal-Perez v. Heckler*,<sup>347</sup> the Second Circuit concluded that the Government's failure to provide social security benefit forms and services in Spanish did not create an illicit classification based on race or national origin.<sup>348</sup> Similarly, the Sixth Circuit held that an equal protection challenge against a city employment exam conducted in English did not implicate a suspect nationality or race.<sup>349</sup> Equal protection claimants, however, must prove intentional discrimination.<sup>350</sup> Courts consider the government's decision to provide services only in English as a facially neutral act and a "reflect[ion], at most, [of] a preference for English over all other languages,"<sup>351</sup> so necessarily, these cases usually fail. In ECOA litigation, by contrast, claimants may challenge facially neutral rules and policies under the disparate impact ("effects test") analysis.<sup>352</sup> If language minorities can prove that a lender's language practices unreasonably burden a particular race or nationality, they are able to establish a nexus between language and national origin that has eluded claimants in the equal protection context.<sup>353</sup>

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347. 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

348. *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin."), *cert. denied*, 466 U.S. 929 (1984).

349. *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975). *See also* *Vialez v. New York City Housing Auth.*, 783 F. Supp. 109 (S.D.N.Y. 1991) (holding that failure of housing authority to provide termination of tenancy documents in Spanish does not implicate protected class for purposes of an equal protection challenge); Kathryn J. Zoglin, *Recognizing a Human Right to Language in the United States*, 9 B.C. THIRD WORLD L.J. 15, 18-24 (1989) (observing that courts generally have failed to accord suspect or quasi-suspect class status to language minorities in their equal protection claims); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 484-503 (1994) (examining holdings in equal protection claims brought by language minorities).

350. *Soberal-Perez*, 717 F.2d at 42.

351. *Id.*

352. 12 C.F.R. § 202.6(a) n.2 (1995). The Federal Reserve Board has concluded that Congress intended to borrow the effects test from Title VII for use in ECOA claims. *See* *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1029 (N.D. Ga. 1980) (concluding that effects test is available to ECOA claimants). Although after the adoption of the ECOA the Supreme Court undercut the Title VII effects test, the Civil Rights Act of 1991 restored prior law. SHELDON, *supra* note 338, § 9.5.2.2, at 154-55 (discussing ECOA commentary standards).

353. Because the ECOA disparate impact test is borrowed from cases under Title VII, the EEOC Title VII Guideline equating language with national origin is especially persuasive. *See supra* note 346 and accompanying text (discussing presumption in EEOC guidelines that employer English-Only rules constitute national origin discrimination). Although the Ninth Circuit regrettably has rejected that Guideline as "wrong," it rejected only the presumption that an employer's English-Only rule establishes the employee's *prima facie* case under the disparate impact analysis. *See* *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (finding that enactment of English-Only policy does not inexorably lead to abusive environment), *cert. denied*,



Although ECOA litigation has produced little case law applying the "effects test,"<sup>354</sup> a 1994 Policy Statement on ECOA and Fair Housing Act compliance issued by ten government agencies explained the ECOA disparate impact analysis.<sup>355</sup> Discrimination is established by disparate impact "when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis [e.g., national origin] and is not justified by business necessity."<sup>356</sup> Factors relevant to establishing business necessity include cost and profitability.<sup>357</sup> As the Policy Statement suggests, however, even if business necessity justifies a practice with disparate impact, that practice is nonetheless discriminatory "if an alternative policy or practice could serve the same purpose with [a] less discriminatory effect."<sup>358</sup>

Under the standard established in the Policy Statement, victims of a Fraud Bargain can establish discrimination. Disproportionately successful when practiced on language minorities, there is no legitimate business necessity for language fraud.<sup>359</sup> Victims of an Unfair Bargain should also satisfy the threshold showing of discrimina-

114 S. Ct. 2726 (1994). It did not reject the linkage between language and national origin, and remanded the case to allow monolingual Spanish-speaking employees the opportunity to establish the language rule's discriminatory impact, but without the presumption. *Id.*

Professor Perea has predicted that the Supreme Court will reject the EEOC Guideline because it may go beyond statutory language and legislative history. Perea, *supra* note 339, at 831. He concluded that existing protection against national origin discrimination in Title VII (and presumably under the ECOA too) does not adequately encompass discrimination based on a person's ethnic traits such as language. *Id.* Therefore, he urges reform of Title VII to expressly reach discrimination on the basis of "ethnic traits." *Id.*

354. See *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835, 839 (W.D. Mo. 1981) (explaining operation of effects test in acceptance of credit applications). See generally Jeffrey I. Langer & Andrew T. Semmelman, *Creditor List Screening Practices: Certain Implications Under the Fair Credit Reporting Act and the Equal Credit Opportunity Act*, 43 BUS. LAW. 1123 (1988) (observing that paucity of ECOA litigation on effects test has left several unresolved questions such as level of justification needed to establish legitimate business need and what constitutes less discriminatory alternative).

355. Policy Statement on Discrimination on Lending, 59 Fed. Reg. 18,266 (1994) [hereinafter Policy Statement].

356. *Id.* at 18,268. Monolingual language minorities should be able to establish the requisite disparate impact. *Cf. Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (employer's English-Only rule had no disparate impact on bilingual employee who could readily comply with rule if he so desired), *cert. denied*, 449 U.S. 1113 (1981). Courts should reject any argument that the borrower's ease in obtaining a third party to translate dispels any adverse impact. There is disparate impact simply because language minorities do not routinely obtain their own translations. *Cf. Alfonso v. Board of Review*, 444 A.2d 1075, 1080 (N.J. Sup. Ct. 1982) (Wilentz, J., dissenting) (highlighting difficulties language minorities face in obtaining translations from agencies, family, or friends), *cert. denied*, 459 U.S. 806 (1982).

357. Policy Statement, *supra* note 355, at 18,269.

358. Policy Statement, *supra* note 355, at 18,269.

359. The Policy Statement provides that the challenged practice need not adversely affect every member of a protected group to have a disparate impact. Policy Statement, *supra* note 355, at 18,269. Therefore, it is not fatal to the claim that some members of a particular race or national origin are fluent in English and therefore not susceptible to language fraud. *Id.*

tory effect. Here, however, the lender might convince the court that it failed to translate the written bargain on the business ground of cost rather than as a scheme to entrap borrowers into unfair deals.<sup>360</sup> Unfair Bargain claimants may still prevail by suggesting alternate business practices which are both less discriminatory and not unduly expensive. For example, given the large number of Spanish-Only borrowers, a Spanish-Only Consumer could attempt to establish that lenders could efficiently utilize the Spanish language in their transactions.<sup>361</sup> Alternatively, the claimant could argue that, if it is unduly expensive to translate, the lender could simply eliminate the unfair terms from its bargains.

Finally, even Unintended Bargain claimants might utilize the disparate impact analysis. Presumably, a language minority can at least establish a *prima facie* case if a lender's English-Only policy results in a disproportionate number of Unintended Bargains for a particular language group.<sup>362</sup>

### 3. *Other civil rights laws*

The Federal Fair Housing Act<sup>363</sup> protects home purchasers, lessees, and borrowers against race and national origin discrimination by employing the same proof standards available to ECOA claimants.<sup>364</sup> Complementing federal law, many state laws proscribe racial, and sometimes, national origin discrimination in consumer credit<sup>365</sup> and other consumer transactions.<sup>366</sup>

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360. See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (holding that operation of state unemployment office business in English had rational basis because of additional burdens Spanish translations would impose on California's finite resources).

361. See *supra* notes 191-97 and accompanying text (singling out substantial language minority group for protection does not necessarily discriminate against others). Indeed, the Federal Reserve Board has determined that California's requirement that certain lenders translate certain loan documents into Spanish is consistent with the ECOA. See FRB Official Board Interpretation, 42 Fed. Reg. 22,861, § 202.1102 (1977) ("A state requirement that contract terms be made more easily understandable for one group is . . . not inconsistent with the [ECOA].").

362. Cf. *Pabon v. Levine*, 70 F.R.D. 674, 675-77 (S.D.N.Y. 1976) (denying motion for summary judgment against challenge of state unemployment office language practices under federal law that prohibits race or national origin discrimination in programs receiving federal assistance because plaintiff alleged that state's failure to employ Spanish-speaking personnel and to provide bilingual forms and notices had discriminatory impact on Spanish-speaking persons).

363. 45 U.S.C. § 3601 (1994).

364. *Id.* § 3617; see *SHELDON*, *supra* note 338, § 2.3, at 53-55 (providing overview of antidiscrimination provisions of Fair Housing Act). Regulations adopted under that Act provide that "the use of English language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media, may have discriminatory impact." 24 C.F.R. § 109.25 (1995).

365. See *SHELDON*, *supra* note 338, § 2.5, at 56, app. E (compiling state credit discrimination laws). The ECOA requires an election of remedies between the ECOA and any counterpart state law when the claimant seeks monetary damages. 15 U.S.C. § 1691d(e) (1994).

C. *Employing Unfair Trade Practice Laws Against Language Fraud and the English-Only Marketplace*

Federal law prohibits "unfair or deceptive acts or practices" in interstate commerce.<sup>367</sup> In addition, all fifty states and the District of Columbia address these practices with laws known as Unfair or Deceptive Acts or Practices (UDAP) statutes.<sup>368</sup> The UDAP laws provide language minorities several alternative means to challenge marketplace abuses.

UDAP statutes usually prohibit fraudulent misrepresentations in consumer transactions. They can complement, and in some instances, supplant a common law fraud action.<sup>369</sup> Thus, Fraud Bargain victims may rely on the UDAP laws. In addition, UDAP laws may impose a duty on businesses to disclose unfair terms, either expressly or under the "catch-all" prohibition of unfair or deceptive business practices generally.<sup>370</sup> The victim of an Unfair Bargain might, therefore, have recourse to UDAP laws.<sup>371</sup> UDAP laws may also address the Unintended Bargain. Consent agreements entered into by the FTC in the 1970s indicate that in some circumstances it may be unfair or deceptive for a business to fail to translate the terms of a bargain for language minority customers even though the bargain is not necessarily unfair and the business does not misrepresent its terms.<sup>372</sup> Several of these consent agreements declared the practice of merchants who failed to translate the written contract and disclosures following negotiations in a language other than English, as unfair or deceptive.<sup>373</sup> Most of the consent agreements only

366. *E.g.*, CAL. CIVIL CODE § 51 (West Supp. 1995) (stating that all persons in California are free and equal, no matter what ancestry or national origin, in all business establishments whatsoever); *id.* at § 1812.642 (extending ECOA protection to rent-to-own transactions).

367. 15 U.S.C. § 45 (1994).

368. Bender, *supra* note 94, at 640-41. *See generally* DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW §§ 3.03-.06, at 3-8 to -70 (1995) (discussing deceptive trade practices); SHELDON & CARTER, *supra* note 97, § 3.2, at 85-90 (discussing state UDAP provisions).

369. *See infra* Part III.D.2 (contrasting interplay between common law fraud and UDAP action).

370. *See infra* Part III.D.3 (comparing Unfair and Unintended Bargains under common law and UDAP); *see also* SHELDON & CARTER, *supra* note 97, §§ 4.2.13 to -.14, at 118-20 (discussing failure to disclose and other deceptive practices).

371. The UDAP may also codify the unconscionability doctrine to authorize courts to invalidate a bargain based on the substantively unfair term. *See infra* notes 418-19 and accompanying text (discussing more potent remedies available under UDAPs than under UCC and common law).

372. For discussion of the precedential value of FTC consent agreements, *see* SHELDON & CARTER, *supra* note 97, § 3.4.4.3, at 101-02 (observing that courts use these agreements as guide to interpreting state UDAP laws).

373. SHELDON & CARTER, *supra* note 97, § 3.4.4.3, at 101-02.

required translation of the documents into Spanish.<sup>374</sup> A few consent agreements required translation into any language in which the transaction was “principally conducted” (a Language of the Bargain approach).<sup>375</sup> Often, the consent agreements looked beyond the oral sales presentation to require translations of bargains initiated by advertisements in Spanish (a Language of the Solicitation approach).<sup>376</sup> Finally, a few of the agreements seemed to employ the broad Language of the Consumer Standard, although just for the Spanish-Only Consumer.<sup>377</sup> In addition to these consent agreements, language minorities can point to the FTC door-to-door and used car rules, and to state UDAPs and regulations thereunder, which declare the failure to provide translations in certain situations an unfair or deceptive practice.<sup>378</sup> Together with the consent agree-

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374. See *In re Grand Spaulding Dodge, Inc.*, 90 F.T.C. 406, 408-10 (1977) (ordering car dealer to cease from failing to translate loan documents and disclosures into Spanish following negotiations in Spanish; this approach uses both Language of the Bargain and Fixed Language Standards); *In re J. Kurtz & Sons, Inc.*, 87 F.T.C. 1300, 1312-34 (1976) (requiring appliance retailer to provide English/Spanish disclosures of customers' rights); *In re Weil & Co.*, 87 F.T.C. 406, 407-10 (1976) (requiring furniture retailer to furnish buyers with Spanish language translations of contracts); *In re Almacenes Hernandez Corp.*, 87 F.T.C. 400, 402-05 (1976) (requiring furniture distributor to cease failing to provide buyers with Spanish language translations); *In re Busch's Jewelry Co.*, 87 F.T.C. 394, 396-99 (1976) (requiring jewelry merchant to provide Spanish-speaking customers with Spanish translations of sales documentation); *In re Daby's Furniture Corp.*, 87 F.T.C. 389, 391-93 (1976) (requiring furniture seller to furnish Spanish translations of sales documents to Spanish-speaking customers and to display in store notices of customers' right to receive same); *In re J & J Furniture Corp.*, 87 F.T.C. 383, 385-88 (1976) (requiring furniture distributor to display notices in store of customers' rights regarding Spanish translations); *In re Joseph's Furniture Co.*, 84 F.T.C. 1310, 1316-27 (1974) (requiring furniture dealer to furnish buyers with Spanish and English contracts and disclosures following sales presentations in Spanish).

375. See *In re Kelocor Corp.*, 93 F.T.C. 9, 15-22 (1979) (requiring finance company to provide translation of Truth in Lending credit insurance disclosures); *In re Crown Trading Co.*, 86 F.T.C. 77, 81-85 (1975) (requiring television dealer to disclose Truth in Lending information to customers in language of sales presentation).

376. E.g., *Grand Spaulding Dodge*, 90 F.T.C. at 408-10 (requiring automobile dealer to furnish bilingual disclosures and documents).

377. See *In re Lafayette United Corp.*, 88 F.T.C. 683, 704 (1976) (“[R]espondents shall not contract for the sale of any course of instruction . . . to any Spanish-speaking person who cannot read and write English proficiently, unless the sales contract or other agreement is itself set forth in the Spanish language.”); *In re Michael Yaccarino*, 82 F.T.C. 279, 283-87 (1973) (requiring New Jersey automobile dealer to provide customers with contracts and credit disclosures printed in Spanish).

378. See, e.g., 16 C.F.R. § 429.1 (1995) (declaring it “unfair or deceptive act or practice” to fail to translate contract into same language as used principally in oral sales presentation); CONN. AGENCIES REGS. § 42-110b-21 (1975) (designating failure to include disclosures in same language as non-English advertising as unfair or deceptive practice); FLA. ADMIN. CODE ANN. r. 2-9.005 (1995) (making illegal failure to provide translations in certain consumer transactions); ILL. ANN. STAT. ch. 815, para. 505/2N (Smith-Hurd 1993) (declaring it “unlawful practice” to fail to provide translation when conducting retail transaction in language other than English); MASS. REGS. CODE tit. 940, § 8.05 (1995) (treating mortgage broker's or lender's failure to interpret or translate material terms of loan transaction into language borrower understands as unfair or deceptive practice); cf. 49 Fed. Reg. 7740, 7778 n.79 (1984) (explaining that lenders should give cosigner disclosure required by 16 C.F.R. § 444.3 (1994) in same language as

ments, these rules and regulations can be urged as guides to construe a UDAP "catch-all" that outlaws unfair or deceptive practices generally.

Despite these opportunities in existing UDAP laws, many inadequacies and uncertainties compel the exploration of other solutions. Reform of the UDAP laws might address some of the problems detailed below. These shortcomings include the lack of any private action under the federal and a few state UDAPs,<sup>379</sup> together with the broad exclusions from coverage in many UDAPs that may exempt such mainstream transactions as loans of money,<sup>380</sup> insurance,<sup>381</sup> and residential leases.<sup>382</sup> When compared to the few freestanding translation statutes that now exist, UDAPs sometimes add criteria for recovery that frustrate consumers. For example, some UDAPs require that private litigants prove they suffered an ascertainable loss.<sup>383</sup> Sometimes, language minorities must urge the favorable construction of their UDAP unfair or deceptive "catch-all" to encompass a merchant's language practices.<sup>384</sup> Further, some state UDAPs have no "catch-alls" and the language minority must look for an applicable enumerated unfair or deceptive practice.<sup>385</sup> Finally, the FTC

underlying loan contract or they will commit unfair or deceptive practice).

379. See Bender, *supra* note 94, at 640-41 (explaining that most states expressly or implicitly authorize private enforcement of their UDAP laws, but that there is no private right under Federal Trade Commission Act).

380. See, e.g., Barber v. National Bank, 815 P.2d 857, 861 (Alaska 1991) (holding that loan is not good or service covered by state UDAP); Lamm v. Amfac Mortgage Corp., 605 P.2d 730, 731 (Or. Ct. App. 1980) (finding that Unfair Trade Practices Act does not apply to loans or extensions of credit); see also SHELDON & CARTER, *supra* note 97, § 2.2.1.2, at 43-46 (discussing shortcomings of exemptions for credit and banking activities).

381. See PRIDGEN, *supra* note 368, § 8.05[2], at 8-19 (noting that Congress exempted insurance industry from federal UDAP).

382. See SHELDON & CARTER, *supra* note 97, § 2.2.6, at 52-54 (discussing UDAPs with regard to personality related to real estate, residential leases, and landlord/tenant relations).

383. See PRIDGEN, *supra* note 368, § 5.04[1], at 5-21 (noting in addition that some courts have implied this requirement). The loss condition could pose problems to victims of both Unfair and Unintended Bargains. Some unfair provisions may not result in an ascertainable loss of money until exercised. Cf. Orlando v. Finance One of West Virginia, Inc., 369 S.E.2d 882, 888 (W. Va. 1988) (holding that claimant failed to demonstrate ascertainable loss because lender had not yet attempted to enforce unfair waiver of homestead exemption). Undisclosed provisions that are fair, but unintended, might not result in the requisite loss even when enforced. *Id.*

384. For discussion of the degree of deference to federal standards of unfairness and deception in interpreting state UDAPs, see SHELDON & CARTER, *supra* note 97, § 3.4.4, at 99-102; Bender, *supra* note 94, at 648-49. Cf. Ayres, *supra* note 184, at 865 (commenting that using UDAPs to reach discrimination against women and minorities in automobile purchases will require reconceptualization of what is considered unfair and deceptive).

385. See Bender *supra* note 94, at 645-50 (explaining Oregon law that conditions use of its "catch-all" on prior administrative rulemaking). In those states that proscribe "deceptive" practices generally but not "unfair" practices, the FTC translation consent agreements are instructive in their assumption that the failure to provide the translations is both unfair and deceptive. E.g., *In re Grand Spaulding Dodge, Inc.*, 90 F.T.C. 406, 408-10 (1977) (holding that

consent agreements preceded the FTC's adoption of new federal standards of unfairness and deception in 1980 and 1983 respectively.<sup>386</sup> "Unfairness" now asks whether the particular practice causes "substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."<sup>387</sup> One commentator does conclude that failing to provide translations "falls nicely" into this new standard:

A non-English speaking consumer cannot reasonably avoid the fact that he or she cannot understand English disclosures. The confusion can lead to substantial injury. And in a situation where a seller has a large number of non-English speaking customers, it would not be costly to add disclosures in a second language.<sup>388</sup>

#### D. *Language Fraud and the English-Only Marketplace as Fraudulent Conduct*

##### 1. *Overview of common law remedies*

After considering whether drug manufacturers must warn language minorities of product dangers, California's Supreme Court recently decided to defer to the legislature as the proper institution to impose such a duty.<sup>389</sup> Because neither the legislature nor any administrative agency had done so, the court refused to establish a judicial duty to translate product warnings.<sup>390</sup> Although this Article urges legislatures to enact standards that entitle language minorities to translations in consumer transactions, justice for language minorities depends on the concurrent evolution of common law fraud and unconscionability. Courts should also liberally interpret the existing codification of each of these doctrines so as to encompass translation rights.

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automobile dealer's practice of failing to provide Spanish-speaking customers with relevant bilingual disclosures is "unfair, misleading and deceptive").

386. See SHELDON & CARTER, *supra* note 97, § 4.2.2.0, at 127-29 (discussing deception); *id.* § 4.3.2, at 129-30 (discussing unfairness in context of FTC). Congress codified the 1980 FTC standard of unfairness in its 1994 reauthorization of the FTC. See Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified at 15 U.S.C. § 45(n)).

387. 15 U.S.C. § 45(n) (1994).

388. SHELDON & CARTER, *supra* note 97, § 5.2.1, at 187.

389. Ramirez v. Plough, Inc., 863 P.2d 167, 167 (Cal. 1993).

390. *Id.* at 176.

## 2. *Fraud bargains as common law and UDAP fraud*

Businesses that misrepresent the terms of a written bargain to language minorities might claim that the consumer's reliance on the misrepresentation is unreasonable. They would refer to courts that have held that someone who fails to read a contract has not acted reasonably to protect herself and cannot protest the other party's misrepresentation.<sup>391</sup> Courts must reject this argument and punish intentional fraud without regard to whether the victim relied reasonably on the misrepresentation; to recognize negligence as a defense to an intentional tort is bad social policy.<sup>392</sup>

In transactions that they govern, state UDAPs have effectively displaced the common law as a remedy for fraud in part because UDAPs often eliminate some elements of proof that the common law requires. Because some UDAPs abandon the need to establish reasonable reliance, language minorities should plead their claims for relief from the Fraud Bargain under a UDAP whenever possible.<sup>393</sup>

## 3. *Unfair and unintended bargains as common law and UDAP fraud*

Courts usually hold illiterate parties to the terms of their unread contract unless the other party has misrepresented the writing to them.<sup>394</sup> This fraud exception to the so-called duty to read has not been extended to nondisclosure of unfair or otherwise material terms. In tort and contract law generally, however, the action for nondisclosure is gaining momentum. Silence is considered the equivalent of misrepresentation only when there is some legally recognized duty to

391. See *supra* Part I.C.2 (discussing fraud exception to duty to read); cf. *Rivergate Corp. v. McIntosh*, 421 S.E.2d 737, 739 (Ga. Ct. App. 1992) (rejecting claim of lessee that it was too dark to determine that he was not signing purchase agreement as he was led to believe because party cannot rely on misrepresentations when he can read and no fraud prevents him from reading contract). The merchant may be particularly inclined to raise this argument when its bilingual salesperson negotiates the oral bargain but has not been asked to translate the English written bargain. In the event that the salesperson assumes to translate the written bargain, courts must hold the merchant liable in fraud for a false translation.

392. See *KEETON ET AL.*, *supra* note 53, § 108, at 750 (rejecting contributory negligence as defense to intentional deceit).

393. See *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355, 1361 (Ill. App. Ct. 1992) (reviewing how Illinois UDAP eliminates common law fraud element that requires plaintiff to ascertain diligently accuracy of misstatements); *Robertson v. Boyd*, 363 S.E.2d 672, 676-77 (N.C. Ct. App. 1988) (holding that trial court properly dismissed common law fraud claim against seller because buyer did not make diligent inquiries and inspect for termite damage, but finding that claimant did state fraud claim under UDAP). But see *Massey v. Thomaston Ford Mercury*, 395 S.E.2d 663, 664-65 (Ga. Ct. App. 1990) (stating that claimant under Georgia UDAP cannot recover if she had "equal and ample opportunity to ascertain the truth" but did not do so diligently (quoting *Delta Chevrolet v. Wells*, 377 S.E.2d 250, 251 (1988))).

394. See *supra* Part II.C.3(1)-(2).

speak.<sup>395</sup> The courts, however, have established several grounds for such a duty.<sup>396</sup> Once limited to a few narrow exceptions such as the existence of a fiduciary relationship between the parties, erosion of the right to remain silent is now "so broad that a resourceful judge can almost always find a way to fit the facts of a case within the confines of one of the exceptions."<sup>397</sup>

Although the doctrine of unconscionability may also address the nondisclosure of unfair terms,<sup>398</sup> its remedial limitations make that doctrine less than ideal.<sup>399</sup> In contrast to the tepid remedies of unconscionability, fraudulent nondisclosure unleashes a more potent arsenal that might include punitive damages.<sup>400</sup> Language minorities, therefore, should actively seek the judicial recognition of a duty to disclose (translate) certain bargains.

One emerging exception to the right to remain silent should be of particular use to victims of an Unfair Bargain. The leading torts treatise describes this exception as "a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed."<sup>401</sup> Using this exception, most courts now require sellers of realty or personalty to disclose material, latent defects.<sup>402</sup> For language minorities, unfair terms

395. See Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 124 (1993) (discussing exceptions to rule that party may remain silent).

396. *Id.* at 125.

397. *Id.*

398. See *infra* Part III.E (discussing unconscionability and recommending that legislatures reform UDAP laws to include provisions protecting against unconscionable conduct).

399. See *id.* (noting limit on remedies under unconscionability doctrine and urging legislation to expand those remedies).

400. See, e.g., *Godrey v. Steinpress*, 180 Cal. Rptr. 95, 109-11 (Ct. App. 1982) (holding that fraudulent nondisclosure of termites in real estate transaction is grounds for awarding punitive damages).

401. KEETON ET AL., *supra* note 53, § 106, at 739. *The Restatement (Second) of Torts* articulates this exception as a duty to disclose facts basic to the transaction when one party to the bargain knows "that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977). Similarly, *The Restatement (Second) of Contracts* requires disclosure of facts necessary to correct "a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the facts amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." RESTATEMENT (SECOND) OF CONTRACTS, § 161(b) (1979).

402. See, e.g., *Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960) (holding that latent defect "known to the seller of a house" creates duty of disclosure); *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985) (holding that nondisclosure is equivalent to willful misrepresentation); *Foust v. Valleybrook Realty Co.*, 446 N.E.2d 1122, 1125 (Ohio App. 1981) (same). See generally Serena Kafker, *Sell and Tell: The Fall and Revival of the Role on Nondisclosure in Sales of Used Real Property*,



written in English are the equivalent of latent defects. Just as courts have begun to protect the buyer of a house with latent termite damage, even if she failed to inspect the home, courts should protect language minorities<sup>403</sup> against the nondisclosure of unfair terms, even though they did not seek a translation.<sup>404</sup>

Courts could construe other exceptions to the general right to remain silent to protect language minorities. For example, nondisclosure constitutes fraud when the silent party takes some positive action to conceal the truth.<sup>405</sup> Language minorities should argue that a merchant's decision to strike the written bargain in English is positive action to conceal unfair terms from a consumer unable to read English.<sup>406</sup>

The so-called half-truth exception requires full disclosure when necessary to prevent a partial statement of facts from being misleading.<sup>407</sup> For example, when the merchant undertakes to translate the written bargain orally, but leaves out certain unfair terms, the omission should constitute fraud. Similarly, if a party conducts oral negotiations, wholly or in part, in a language other than English, the language minority should argue that any unfair term in the written bargain must also be translated.<sup>408</sup>

12 U. DAYTON L. REV. 57 (1986) (noting that modern trend is to require disclosure rather than old doctrine of *caveat emptor*). See also RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d (1979) ("A seller of real or personal property is . . . ordinarily expected to disclose a known latent defect of quality or title that is of such a character as would probably prevent the buyer from buying at the contract price."). In the analogous area of products liability, courts require manufacturers to warn of certain product dangers. See RESTATEMENT (SECOND) OF TORTS § 388 (1965) (stating that suppliers of chattels known to be dangerous are liable for physical harm that results). The First Circuit has held that a jury could consider whether a manufacturer must use symbols to warn of insecticide dangers, even if the government only required a written warning, when it should have foreseen that illiterate farmworkers would use its product. *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965).

403. This duty to disclose should also extend to protect English-speaking consumers whom the merchant knows are unable to read English.

404. Arguably, courts should extend the duty to disclose to victims of Unintended Bargains when the business knows that the consumer does not intend a particular bargain. For example, a salesperson fluent in Spanish might overhear a conversation between two customers that they intend to purchase a car, not to lease one. In such a scenario, the merchant should disclose in Spanish that the bargain to be struck is a lease.

405. Cf. *Smith v. First Family Fin. Servs., Inc.*, 626 So. 2d 1266, 1273 (Ala. 1993) (holding that lender must disclose all finance charges to borrower). See generally CALAMARI & PERILLO, *supra* note 56, at 367 (stating that actions "designed to hide the truth" may result in liability).

406. Cf. *Heuter v. Coastal Air Lines*, 79 A.2d 880, 883 (N.J. Super. Ct. App. Div. 1951) (holding that jury should decide whether airline intended to deceive Puerto Rican crash victim when he signed release written in English, in which he was not literate, despite absence of any affirmative misstatement).

407. See RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1976) (stating that "[o]ne party . . . [has] duty . . . to prevent his partial or ambiguous statement of the facts from being misleading").

408. Supporting this result are the FTC consent agreements that declared bargains to be deceptive when the seller struck the oral bargain in Spanish, but the written contract and

Some courts extend the duty to disclose in all fiduciary or confidential relationships to bargains where one party justifiably believes the other is looking out for her interests.<sup>409</sup> Dealing with language minorities might give rise to one of these special relationships that imposes a duty to disclose unfair terms,<sup>410</sup> especially if the business targets language minorities with assurances, express or implied, that it will treat them fairly. For example, Spanish-Only Consumers might justifiably perceive a "Se Habla Español" sign as the merchant's assurance that it will translate any unfair or otherwise material terms of the bargain.<sup>411</sup> Arguably, the merchant creates the same expectation when it provides a bilingual salesperson to negotiate the oral bargain.<sup>412</sup>

Finally, language minorities might establish a duty to disclose under applicable UDAP laws. Several UDAPs expressly require the disclosure of material facts in the transactions they govern.<sup>413</sup> Unfair terms in the English-language contract are material facts that should be disclosed (translated). These laws may also protect the victim of the Unintended Bargain, at least when the seller is aware of the buyer's misunderstanding, by treating the mistaken terms in the English-Only bargain as material facts to be translated. Most UDAPs also generally prohibit unfair or deceptive practices.<sup>414</sup> Failing to

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disclosures were in English. See *supra* notes 372-77 and accompanying text (discussing cases in which precedent was established that prohibits sellers from choosing one language for oral negotiations and another language for written agreement).

409. CALAMARI & PERILLO, *supra* note 56, § 9-20, at 369-70.

410. Cf. *Boonstra v. Stevens-Norton, Inc.*, 393 P.2d 287, 290 (Wash. 1964) (declaring that parties in fraud action had at least quasi-fiduciary relationship when one had limited knowledge of real estate transactions and of English, although court only implied that language was factor in decision).

411. Representations that the merchant is "serving the Latino/a community" may create the same expectation. See Lisa Leff, *The Art of the Deal—in Spanish; Car Dealerships Using Hispanic Salespeople to Pull in Customers*, WASH. POST, Feb. 5, 1994, at B1 (describing advertising boasts of Maryland car dealer that it has been "serving the Latino community for 53 years").

412. Cf. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 12 (1981) (arguing that when two parties bargain in Spanish, law should require seller to translate written bargain because buyer has relied on superior knowledge of seller).

413. E.g., ARIZ. REV. STAT. ANN. § 44-1522(A) (1994); ARK. CODE ANN. § 4-88-108 (Mitchie 1991); DEL. CODE ANN. tit. 6, § 2513(a) (1993); ILL. ANN. STAT. ch. 815, para. 505/2 (Smith-Hurd 1993); KAN. STAT. ANN. § 50-626 (1994); MD. CODE ANN., COM. LAW § 13-301 (1990); MICH. COMP. LAWS ANN. §§ 445.903(s) & (bb) (West 1989 & Supp. 1995); NEV. REV. STAT. ANN. § 598.0923(2) (Michie 1994); N.J. STAT. ANN. § 56:8-2 (West 1989); OR. REV. STAT. § 646.608 (1993); S.D. CODIFIED LAWS ANN. § 37-24-6(1) (1994); TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (West 1987 & Supp. 1995).

414. See *supra* Part III.C (noting basic contours of UDAP laws and their applicability in language minority context).

disclose or translate unfair terms, therefore, might be actionable by language minorities under these UDAP "catch all."<sup>415</sup>

*E. Language Fraud and the English-Only Marketplace as Unconscionable Conduct*

Although the unconscionability doctrine should encompass the Unfair Bargain, its insistence on substantive unfairness may exclude victims of the Unintended Bargain.<sup>416</sup> Moreover, the unconscionability doctrine's inadequate remedies fail to deter unconscionable conduct.<sup>417</sup> Codifications of the doctrine have begun to address both concerns, but additional reform is needed.

In contrast to the inadequate remedies under the common law and the first generation codification of the doctrine in UCC Section 2-302, some second generation codifications authorize more potent remedies. By invoking UDAPs that proscribe unconscionable practices,<sup>418</sup> language minorities can access the range of UDAP remedies that might include restitution, attorneys' fees, minimum damages, double or treble damages, and even punitive damages.<sup>419</sup> Another second generation statute, Article 2A of the UCC, authorizes courts to grant "appropriate relief" and attorneys' fees to victims of unconscionable consumer leases.<sup>420</sup> To continue the development of adequate remedies, state legislatures should reform their UDAPs to (1) explicitly encompass unconscionable conduct, (2) extend to consumer transactions generally,<sup>421</sup> and (3) provide remedies sufficient to deter unlawful practices.<sup>422</sup> Current revision of UCC Article 2 must address the need for remedies sufficient to deter unconscionable conduct.<sup>423</sup>

415. Cf. *Milbourne v. Mid-Penn Consumer Discount Co.* (*In re Milbourne*), 108 B.R. 522, 533-38 (Bankr. E.D. Pa. 1989) (discussing "catch all" provision of Pennsylvania's UDAP law and concluding that lender's failure to disclose to borrowers disadvantages of its refinancing bargain, as compared to its new loan bargain, is unfair practice under "catch all").

416. See *supra* Part I.C.3 (discussing protection that unconscionability doctrine may afford language minorities).

417. See *supra* Part I.C.3.

418. See SHELDON & CARTER, *supra* note 97, § 4.4.1, at 136 (counting 12 such UDAPs). Unconscionable conduct might also fall within a UDAP "catch-all" for unfair or deceptive practices. See *id.* at 136-37.

419. See SHELDON & CARTER, *supra* note 97, ch. 8, at 415-62.

420. U.C.C. § 2A-108 (1990); see also Nehf, *supra* note 240, at 812 (noting that unlike § 2-302, Article 2A "leaves room" for courts to award affirmative damages).

421. See *supra* notes 380-82 and accompanying text (discussing areas not covered by some UDAP laws including banking and insurance services).

422. See Bender, *supra* note 94, at 666-81 (detailing inadequacies of private remedy in Oregon's UDAP and proposing methods to improve protection of consumers).

423. See Gail Hillebrand, *The Redrafting of UCC Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191, 193 (1994) (urging that reformers of Article 2 (and also Article 9 for secured transactions) adopt unconscionability provision in Article 2A).

Legislatures should also address the failure of the common law and the first generation statutes to explicitly authorize judges to strike down bargains as unconscionable based on procedural unfairness alone.<sup>424</sup> Some second generation statutes have begun to expand the reach of the doctrine. For example, the 1974 Uniform Consumer Credit Code (UCCC) specifically addresses the abuse of language minorities. The UCCC's unconscionability standard asks whether the seller, lessor, or lender "has knowingly taken advantage of the inability of the consumer or debtor reasonably to protect his interest by reason of . . . illiteracy, inability to understand the language of the agreement, or similar factors."<sup>425</sup> Similar language provisions are found in the 1968 UCCC,<sup>426</sup> the Uniform Consumer Sales Practices Act,<sup>427</sup> and in the various state consumer laws that codify or are influenced by these uniform laws.<sup>428</sup> The Official Comments to the 1974 UCCC suggest that its language provision contemplates a substantively unfair bargain:

[A consumer is entitled to relief from] a sale of goods on terms known by the seller to be disadvantageous to the consumer where the written agreement is in English, the consumer is literate only in Spanish, the transaction was negotiated orally in Spanish by the seller's sales[person], and the written agreement was neither translated nor explained to the consumer, but the mere fact a consumer has little education and cannot read or write and must sign with an "x" is not itself determinative of unconscionability.<sup>429</sup>

If so construed, victims of Unfair Bargains are protected. These second generation statutes, however, may not extend to the Unintend-

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424. See *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121-22 (Ct. App. 1982) (declaring that unconscionability has both procedural and substantive elements and that under California's general unconscionability statute modeled after UCC § 2-302 "the mere fact that a contract term is not read or understood . . . will not authorize a court to refuse to enforce the contract [because] . . . commercial practicalities dictate that unbargained for terms only be denied enforcement where they are also substantively unreasonable").

425. UNIF. CONSUMER CREDIT CODE § 5.108(4)(e), 7A U.L.A. 168 (1974).

426. UNIF. CONSUMER CREDIT CODE § 6.111(3)(e), 7 U.L.A. 838, 839 (1968) (making reference to "inability to understand the language" as factor in finding of unconscionability).

427. UNIF. CONSUMER SALES PRACTICES ACT § 4(c), 7A U.L.A. 241 (1971) (asking whether merchant "knew or had reason to know" that he took advantage of consumer's illiteracy or inability to understand language).

428. *E.g.*, ARK. CODE ANN. § 4-88-107 (Michie 1991 & Supp. 1993); COLO. REV. STAT. § 5-6-111 (1992); IDAHO CODE § 28-46-111 (Michie 1995); IDAHO CODE § 48-603C (Michie Supp. 1995); IND. CODE § 24-4.5-6-111 (1991 & Supp. 1994); IOWA CODE ANN. § 537.5108 (West 1987); KAN. STAT. ANN. § 16a-6-111 (1988); KAN. STAT. ANN. § 50-627 (1994); ME. REV. STAT. ANN. tit. 9-A, § 6-111 (West 1980); MICH. COMP. LAWS ANN. § 445.903 (West Supp. 1995); OHIO REV. CODE ANN. § 1345.03 (Anderson 1993); OKLA. STAT. ANN. tit. 14A, § 6-111 (West 1983); OKLA. STAT. ANN. tit. 15, § 761.1 (West Supp. 1995); OR. REV. STAT. § 646.605 (1993); S.C. CODE ANN. § 37-5-108 (Law. Co-op. 1989); W. VA. CODE § 46A-7-109 (1995); WIS. STAT. ANN. § 425.107 (West 1988); WYO. STAT. § 40-14-611 (1993).

429. UNIF. CONSUMER CREDIT CODE § 5.108 cmt. 4, 7A U.L.A. 167, 170-71 (1974).

ed Bargain, unless perhaps the merchant is aware of the consumer's mistake and takes knowing advantage by failing to translate.<sup>430</sup> Even when the merchant is unaware of the consumer's mistaken understanding of the bargain, courts should exercise their wide discretion under these laws and protect the language minority if the merchant knew of the language barrier.<sup>431</sup> Alternatively, the victim of an Unintended Bargain can urge relief under those second generation statutes that expressly proscribe unconscionable "conduct" without reference to unfair terms. For example, Article 2A-108 of the UCC outlaws lease contracts "induced by unconscionable conduct."<sup>432</sup>

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430. These circumstances could entitle the consumer to relief under the doctrine of unilateral mistake. Under the *Restatement (Second) of Contracts*, a mistake as to a basic assumption that has a material adverse effect on the bargain will support rescission if the mistaken party does not bear the risk of the mistake and, among other alternatives, "the other party had reason to know of the mistake." § 153(b) (1979). By allocating the risk of the mistake wherever reasonable, § 154 of the *Restatement* gives courts substantial discretion to decide which party bore that risk. *Id.* § 154(c). Thus far, courts have had few occasions to consider claims of unilateral mistake resulting from a language barrier. Compare *Teran v. Citicorp Person-to-Person Fin. Ctr.*, 706 P.2d 382, 388 (Ariz. Ct. App. 1985) (stating that if Spanish-Only Consumers failed to understand that their home was collateral for loan, their mistake "was unilateral only, and cannot afford ground for relief") with *Oh v. Wilson*, No. 26122, 1996 WL 38213, at \*3 (Nev. Jan. 31, 1996) (ruling that trial court erred in awarding summary judgment to holders of release of claims when material fact existed as to whether insurer knew that limited English claimant failed to understand release).

The *Restatement's* rule for standardized contracts also grants relief from a term that the other party has reason to know is unintended. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

431. Although the 1974 UCC refers to "knowingly" taking advantage of a language barrier, the Uniform Consumer Sales Practices Act asks whether the other party "knew or had reason to know" that it was taking advantage of the language barrier. UNIFORM CONSUMER SALES PRACTICES ACT § 4(c), 7A U.L.A. 241 (1971). In articulating a standard for when to refuse to enforce bargains marked by transactional incapacity, Professor Eisenberg preferred a standard that looked to what the other party had reason to know:

It might be appropriate to restrict the doctrine of transactional incapacity to cases in which the fully competent party had actual knowledge of the transactional incapacity; however, a promisee with reason to know has at least some culpability, and more important, a standard requiring actual knowledge might be too difficult to administer. When the evidence demonstrates a lack of actual knowledge, the lesser culpability might be taken into account in fixing the remedy.

Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 766 n.67 (1982). Professor Schwartz criticized the "reason to know" standard because he feared that merchants would avoid the cost of individualized investigation and refuse to deal with members of groups, such as "poor blacks and Chicanos," likely to be judged in some way incompetent to bargain. See Schwartz, *supra* note 62, at 1081-82 & n.64. It is unlikely, however, that the burden of providing translations to often predictable language minority groups will chase merchants out of this growing market. Moreover, civil rights laws will override their decision to oust Latinos/as from the marketplace. See *supra* Part III.B.1 (discussing application of federal civil rights acts to consumer transactions).

432. U.C.C. § 2A-108(2) (1990). See generally Michael J. Herbert, *Unconscionability Under Article 2A*, 21 U. TOL. L. REV. 715, 723-28 (1990) (noting distinction between procedural and substantive unconscionability and questioning whether Article 2A goes beyond the existing doctrines of duress and fraud). Article 2A's reference to unconscionable inducement applies

Finally, even the common law and first generation standard might extend to Unintended Bargains if the court agrees that subjectively undesirable terms are always substantively unfair.<sup>433</sup>

Admittedly, extending the unconscionability doctrine to Unintended Bargain victims may have significant impact on transactions with language minorities. Because a merchant may not know when a language minority has mistaken expectations about the written bargain, cautious merchants will translate every bargain to protect their transactions against later attack. As a result, the unconscionability doctrine might serve as an equivalent to the Language of the Consumer model of positive law.<sup>434</sup>

## *F. Multi-Institutional Strategies to Protect Language Minority Consumers*

### *1. Consumer education programs for language minorities*

Consumer advocates often urge consumer education to complement the disclosure paradigm of consumer protection regulation.<sup>435</sup> Apart from the need for adequate funding that generally plagues

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only to consumer leases. When confronted with an unconscionability challenge to an untranslated commercial bargain one court rejected the claim. *See Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 363 (S.D.N.Y. 1975) (enforcing forum selection clause in German language contract and stating that parties have duty to secure translation of language they do not understand). Courts should grant relief in appropriate circumstances, however, such as when the commercial party has been misled as to the contents of the untranslated bargain. *See, e.g., D & W Cent. Station Alarm Co. v. Yep*, 480 N.Y.S.2d 1015, 1017-18 (Civ. Ct. 1984) (relieving shopkeeper from rental agreement for burglar alarm system on grounds of unconscionability because she was led to believe that agreement terminated on her relocation of business and although agreement provided otherwise, clause was in fine print and shopkeeper could not read English).

433. A danger in extending the unconscionability standard to untranslated bargains that are objectively fair is that consumers might manipulate this standard to seek rescission of bargains whenever "buyer's remorse" sets in. For example, a language minority dissatisfied with an automobile purchase for reasons unrelated to the language barrier might invoke the unconscionability doctrine to urge falsely that she misunderstood some material term of the English bargain. On balance, however, this risk does not justify denying relief to victims of Unintended Bargains. Rather, before granting relief, courts should discern whether the consumer's dissatisfaction is truly language-based (what could be called "subjective substantive unfairness") or results from buyer's remorse. The thorny issue of buyer's remorse can be avoided when legislatures or agencies establish positive rights to translations in consumer transactions that carry sanctions, such as rescission, that do not depend on a showing of some objective loss of money.

434. *See supra* notes 198-209 and accompanying text (discussing Language of Consumer Standard as legislative model protecting any consumer whom merchant knows or has reason to know is unable to understand English).

435. *See* DAVID CAPLOVITZ, *THE POOR PAY MORE* 192 (1967) (arguing that consumer education is one of few solutions short of eradicating poverty); Whitford, *supra* note 246, at 452 (maintaining that both government and media should contribute more to consumer awareness and education).

these programs,<sup>436</sup> an effective consumer education program for language minorities must address issues specific to these consumers.

Any program of consumer education must address issues of content. For language minorities, education should include concepts and devices of the American marketplace with which they are unfamiliar. These concepts may include "as is" sales of used cars, credit insurance, extended product warranties, variable interest rates, rent-to-own transactions, and home loan escrow accounts. Because language barriers present opportunities for abuse, adult English instruction plays a role in the consumer education model for language minorities. Unfortunately, these language programs are often overbooked and underfunded.<sup>437</sup>

In designing consumer education programs for language minorities, it is crucial that planners consult representatives of the particular language group to help determine appropriate content. Moreover, language minorities are often suspicious of government activities.<sup>438</sup> This is particularly true for the Latino/a community in the wake of California's Proposition 187.<sup>439</sup> Programs that originate in federal, state, or local government agencies, such as a state Attorney General's office, therefore, are best presented through private community-based organizations with established linkages of trust and support in the particular language minority community. National consumer organizations (such as the National Consumer Law Center) and groups that advocate for language minorities (such as the Mexican American Legal Defense and Educational Fund and the National Council of La Raza) might develop materials (videotapes, pamphlets, etc.) for use in these programs.

## 2. *Role of consumer protection enforcement agencies*

In many states, officials charged with public enforcement of state UDAPs (typically the state's Attorney General office) must serve a growing number of language minority constituents. More than half the states authorize their enforcement agency to promulgate

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436. See Bender, *supra* note 94, at 643-44 (describing declining enforcement resources for consumer protection efforts at federal level and in Oregon).

437. See CRAWFORD, *supra* note 109, at 17 (reporting that when California's English language initiative passed in 1986, more than 40,000 adults were on waiting list for English-as-a-second-language classes in Los Angeles alone); Barbara Yost, *Immigrants on Waiting List for English Classes; U.S. Newcomers on Track to Crack Language Barrier*, ARIZ. REP., Oct. 29, 1995, at G9 (reporting six-month waiting list for some English language classes in Phoenix area).

438. Susan Girardo Roy, Note, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 271 (1995).

439. See *supra* text accompanying note 208 (opining on possible impact of Proposition 187 on merchant-consumer relations).

regulations under the state UDAP.<sup>440</sup> Too few state agencies have exercised their authority on behalf of language minorities.<sup>441</sup> It is crucial that UDAP enforcement agencies with rulemaking power initiate that process to establish positive rights to translations in consumer transactions.

State UDAP enforcement agencies usually have great discretion in deciding how to deploy their enforcement resources. By aggressive pursuit of the more egregious schemes that target language minorities,<sup>442</sup> these agencies can deliver the message that consumers deserve equal protection and market justice regardless of their race, English language ability, and immigration status. Because businesses individually and through their trade associations keep close watch on UDAP enforcement practices, a single high profile case might alter industry practice. Moreover, UDAP enforcement agencies often communicate with these trade associations through forums and correspondence. Mutually acceptable business practices protecting language minorities could be pursued through these less formal means.

To serve adequately their language minority constituents, state UDAP agencies need to overcome the mistrust of government embedded in the culture of some language groups. Language minority communities must be assured that the law protects them from market abuses regardless of their immigration status, and that state agencies will not report any suspicion of undocumented status to federal immigration authorities.<sup>443</sup> State UDAP agencies can

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440. See SHELDON & CARTER, *supra* note 97, § 3.4.3, at 97-99 (counting 29 states).

441. Attorneys general should follow the examples from Connecticut, Florida, and Massachusetts discussed *supra* note 378. See generally Peter S. Canellos, *AG Now Requires Lenders to Offer Bilingual Service*, BOSTON GLOBE, Oct. 3, 1992, at 16 (Metro) (explaining origins of rulemaking by Massachusetts' Attorney General to protect immigrant borrowers).

442. Translation laws must be enforced or compliance will lapse. Recent incidents indicate that some California merchants appear to have ignored that state's translation law. See Penelope McMillan, *Two Car Dealers Fined \$215,000 in Fraud Cases*, L.A. TIMES, Apr. 23, 1993, at B3 (discussing case of California car dealers who routinely negotiated sales in Spanish, but provided English contracts and were convicted of fraud and fined \$215,000 for practice); Jennifer Warren, *Suit Links Satellite-Dish Seller, Lender to Fraud*, L.A. TIMES, Apr. 1, 1989, at B1 (reporting same practice by satellite-dish vendor). In order to determine compliance with translation duties, enforcement agencies should employ undercover operations similar to those used under antidiscrimination laws.

443. See generally Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REF. 639, 649-56 & n.48 (1994) (demonstrating, through use of statistics, that legal status of immigrants affects types of legal assistance they seek, detailing narrow sources of legal assistance used by undocumented immigrants for their consumer and other legal problems and further noting undocumented immigrants are ineligible for Legal Services Corporation-funded assistance). Even if California's Proposition 187 survives constitutional challenge (see discussion *supra* note 43), its denial of public services to undocumented immigrants does not appear to extend to public consumer protection enforcement activities. See CAL. EDUC. CODE §§ 48215, 66010.8 (West Supp. 1995); CAL. GOV'T



establish communication and trust with language minorities by efforts to (1) establish partnerships with private community-based organizations that deliver services to or advocate for language minorities, (2) publish informational articles on consumer issues in non-English newspapers and other media, (3) reprint consumer brochures in any non-English languages common in the state,<sup>444</sup> (4) staff information and consumer fraud "hotlines" with bilingual operators, and (5) hire bilingual enforcement officers to conduct consumer education programs and to better communicate with language minority victims of market practices that prompt public enforcement efforts.

### 3. *Self-regulation in the marketplace*

Whether to increase their market share, to avoid potential liability under the common law, UDAPs, civil rights laws, or other law, or to promote fair business practices, businesses that want to accommodate language minorities should consider the following model. Based on its past experience, a business should identify any language minority group(s) that frequents it. For any group that frequents the business often (accounting for more than one percent of its transactions)<sup>445</sup> the merchant should (1) translate its advertising, together with any required disclosures, for inclusion in non-English media, (2) hire sufficient numbers of bilingual salespersons able to conduct oral negotiations in the language of these customers,<sup>446</sup> (3) have available translations of every written document to be signed by or

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CODE § 53069.65 (West Supp. 1995) (lacking any provisions that would curtail enforcement of public consumer protection efforts); CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1995); CAL. PENAL CODE §§ 113, 114, 834b (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1995).

444. For example, the FTC offers several Spanish language publications on various unfair or deceptive practices. The U.S. General Services Administration publishes a comprehensive "Lista de publicaciones federales en español para el consumidor" (list of federal consumer publications in Spanish).

Some state English language laws, however, may purport to prevent any government entities from producing publications or otherwise communicating in languages other than English. See TENN. CODE ANN. § 4-1-404 (1991) ("All communications and publications, including ballots, produced by government entities in Tennessee shall be in English . . ."); see also *supra* Part II.A (discussing validity of these laws and their potential effect on consumer protection reforms).

445. The merchant's size may bear on its ability to adopt the proposed self-regulation model. For example, it may be unfeasible for a one-person small business to hire a bilingual salesperson no matter the frequency of its transactions with a particular language minority group. On the other hand, it may not be unreasonable to have available translations in these circumstances.

446. If possible, the employees should be members of the particular language group. Cf. Policy Statement, *supra* note 355, at 18,271 (pointing out that while fair-lending laws are not employment laws, lenders who employ few members of protected classes contribute to climate in which discrimination can occur, and suggesting strategies to facilitate hire of employees of protected classes).

provided to the customer in connection with the transaction,<sup>447</sup> and (4) post a prominent notice of the customer's ability to obtain a bilingual salesperson and translations of the written bargain should she so request.<sup>448</sup>

For less common languages, in which the merchant does not make available oral and written translations, the merchant should (1) orally explain as much of the written bargain as possible in simple terms in the language used to strike the oral bargain, (2) encourage the consumer to obtain a translation of the written bargain, and (3) avoid any puffery about the need for exigency that might deter the consumer from delaying the final bargain to seek out a translation.

At least two obstacles prevent the self-regulation model from wholly displacing the need for government intervention to aid language minority consumers. First, unscrupulous merchants will ignore a voluntary model. Second, merchants inclined to abandon less egregious, but still unsound, English-Only business practices might face backlash that discourages voluntary reform. For example, proponents of the English language movement often target companies that voluntarily adopt bilingual advertising policies. They charge that these policies encourage immigrants to refuse to learn English—the same criticism these proponents level against the provision of government services in languages other than English.<sup>449</sup> Balancing the threat of backlash is the tremendous purchasing power that language minority groups bring to the marketplace, as well as the potential that organizations advocating for their rights might launch boycotts of merchants that do not reasonably accommodate language barriers.

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447. For those documents provided to a merchant by a manufacturer, such as an owner's manual, the merchant can notify the maker of the need for translation. Alternatively, the merchant could orally translate any product hazards that are beyond the scope of the consumer's normal expectations.

448. Representing 2600 members in the real estate finance business, the Mortgage Bankers Association has developed a self-regulation strategy to promote home ownership among minorities and immigrants that incorporates similar goals. See Mary Sit, *Simplifying Home Buying for Immigrants*, BOSTON GLOBE, July 2, 1995, at A39 (describing strategy that includes promoting minority recruitment and distributing Spanish-language brochures on mortgage lending); see also *Spanish Loan Apps Offered by Fannie*, 5 MORTGAGE MARKETPLACE, Jan. 30, 1995, available on 1995 WL 7328863 (reporting publication by Fannie Mae of Spanish mortgage forms and glossary of real estate and mortgage lending terms).

449. See Lee May, *Battle over Bilingualism-Opposition Intensifies to Ads Using Spanish*, L.A. TIMES, Sept. 8, 1986, at 21 (noting widespread debate and controversy concerning use of advertisements in languages other than English and quoting U.S. English director as saying that advertising in Spanish "makes it much more difficult to learn English"); see also Cordero, *supra* note 172, at 51 (noting that English language movement advocates have used many techniques to oppose use of languages other than English in America, including initiating lawsuits, lobbying public officials, and protesting against companies such as Philip Morris, Pacific Bell, and McDonald's for providing directories, billboards, and menus in languages other than English).

#### 4. *Impact of translation technology*

While not yet capable of perfect translations from one language to another, computer software can produce quick and cheap rough drafts of translations into several common world languages including Spanish.<sup>450</sup> Eventually, technology may solve many or most of the problems faced by language minorities in the marketplace.<sup>451</sup> For purposes of striking the oral bargain, consider the application to the marketplace of Professor Piatt's workplace vision of computerized headphones that orally translate dialogue instantaneously.<sup>452</sup> Should this sound far-fetched, consider further that in 1992 an American telephone company previewed a built-in computer voice translator system that, in real time, turns spoken English into Spanish at the recipient's end of the call.<sup>453</sup> A sobering thought is that, at best, these technological aspirations, if realized, only level the consumers' side of a marketplace playing field that still tilts too often in favor of merchants.

### CONCLUSION

In 1962, President John F. Kennedy addressed Congress on behalf of consumers, defining them as "us all."<sup>454</sup> Kennedy articulated four basic consumer rights: the right to safety, the right to choose, the

450. See Michael Desmond, *Windows Software for the Global Economy*, PC WORLD, Mar. 1994, at 88 (describing advent of computer software programs designed to either translate language or help user learn and understand language); *New Translation Service Now Available on CompuServe*, M2 PRESSWIRE, Oct. 3, 1995, available on 1995 WL 10484904 (announcing on-line translation service offering unedited machine translation within minutes, or including human post-editing service for greater accuracy, at cost of \$.03 per word and \$.10 per word respectively).

451. Until recently, translation software did not address the problem of language minorities who are not literate in their native language. New "disk-to-voice" translation technology holds promise in these circumstances. See "Sound Text" Read-Aloud Peripheral Under \$100, NEWSBYTES NEWS NETWORK NEWSBYTES, Sept. 9, 1994, available on 1994 WL 2414657 (describing new real-time translator that can turn typed English into vocalized Spanish).

452. See PIATT, *supra* note 334, at 27 (offering scenario of workers, managers, and customers of any language communicating through computer headphones that translate speaker's language into listener's language of choice). Technology advances might also undercut the efficiency/cost arguments of the English language movement urged to justify the conduct of government business in the single language of English. I hope to explore this area further in a subsequent article.

453. See Stephen Advokat, *Bilingual AT&T*, DET. FREE PRESS, June 10, 1992, at 1C (describing AT&T's Voice English/Spanish Translator system demonstrated at exposition in Seville, Spain, that recognizes and translates 450 words). Subsequently, the AT&T speech synthesizer technology has been used in a portable laptop real-time voice-to-voice translation system designed for use by police departments and hospitals. See *AF Speech Translator Nears Market*, TECH. TRANSFER WK., Jan. 16, 1996, available on 1996 WL 8159972 (noting that system does not yet have large vocabulary).

454. John F. Kennedy, Special Message on Protecting the Consumer Interest, 1962 Cong. Q. 458.

right to be heard, and the right to be informed.<sup>455</sup> To promote the fuller realization of these rights, Kennedy proposed the strengthening of existing government programs and, in certain areas, that Congress enact new legislation.<sup>456</sup> In articulating consumers' right to be heard, Kennedy recognized that, although the consumers' voice is not always heard as loudly or as often as those of smaller, better-organized interests, government has a special obligation to be alert to their needs and to advance their interests.<sup>457</sup> To secure consumers' right to make informed choices, Kennedy urged comprehensive disclosure legislation that Congress ultimately enacted in 1968 as the Truth in Lending Act.<sup>458</sup> Changing demographics compel the additional reforms proposed in this Article to guarantee all persons the equal opportunity to strike informed bargains even if they do not understand English.<sup>459</sup> While no more intrusive on fair bargains than Kennedy's proposals, these reforms are no less in the interest of "us all."

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455. *Id.*

456. *Id.*

457. *Id.* at 458, 461.

458. 15 U.S.C. §§ 1601-1677 (1994).

459. Kennedy's articulation of a right to safety is echoed by those commentators who have urged multilingual hazardous product warnings for language minorities. See Lee, *supra* note 19, at 1136-41 (noting increase in Americans whose primary language is one other than English and concluding that sellers who avail themselves of this segment of U.S. population have duty to warn in all relevant languages).

